RECEIVED
JUL 30 1990
Nat. Gerontology Resource Center
AARP

Special Issue

THE Public Interest

NUMBER 100, SUMMER 1990, PRICE: $5.50

THE AMERICAN CONGRESS

The Congressional Brainwashing Machine	*James L. Payne*
Congress-Bashing for Beginners	*Nelson W. Polsby*
The Permanent Democratic Congress	*Norman Ornstein*
Congressional Despots, Then and Now	*Fred Barnes*
Public Opinion and the "Congress Problem"	*Everett Carll Ladd*
The Independent-Counsel Regime	*Terry Eastland*
A Conservative Defense of Congress	*Mickey Edwards*
Congress and the Courts	*Gary L. McDowell*
Micromanaging Foreign Policy	*L. Gordon Crovitz*
Micromanaging the Administrative Agencies	*Jeremy Rabkin*
Micromanaging the Defense Budget	*Mackubin Owens*
Locke and the Legislative Principle	*Walter Berns*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THE Public Interest

NUMBER 100, SUMMER 1990

CONTENTS

The Congressional Brainwashing Machine	*James L. Payne*	3
Congress-Bashing for Beginners	*Nelson W. Polsby*	15
The Permanent Democratic Congress	*Norman Ornstein*	24
Congressional Despots, Then and Now	*Fred Barnes*	45
Public Opinion and the "Congress Problem"	*Everett Carll Ladd*	57
The Independent-Counsel Regime	*Terry Eastland*	68
A Conservative Defense of Congress	*Mickey Edwards*	81
Congress and the Courts	*Gary L. McDowell*	89
Congressional Micromanagement:		
I. Micromanaging Foreign Policy	*L. Gordon Crovitz*	102
II. Micromanaging the Administrative Agencies	*Jeremy Rabkin*	116
III. Micromanaging the Defense Budget	*Mackubin Thomas Owens*	131
Review Essay:		
Locke and the Legislative Principle	*Walter Berns*	147
Contributors		160

THE PUBLIC INTEREST (ISSN-0033-3557) is published quarterly by National Affairs, Inc., and appears in Winter, Spring, Summer, and Fall issues. Its office of publication is located at 1112 16th Street, N.W., Suite 530, Washington, D.C. 20036. Subscription price: $21 for one year, $38 for two years, $54 for three years. Add $3 annually for Canadian and foreign subscriptions. Unsolicited material cannot be returned unless accompanied by sufficient return postage. Second-class postage is paid at Washington and at additional mailing offices. ©1990 by National Affairs, Inc. Postmaster: Please send all changes of address to *The Public Interest* Subscription Office, Dept. PI, P.O. Box 3000, Denville, NJ 07834.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Editors
Irving Kristol and Nathan Glazer

Publication Committee
Martin Feldstein
Harry Kahn
H. J. Kaplan
Charles Krauthammer
Glenn C. Loury
Harry McPherson
Daniel P. Moynihan
Charles Murray
Isabel V. Sawhill
Martin E. Segal
Arthur L. Singer, Jr.
Roger Starr
James Q. Wilson

Executive Editor
Joel Schwartz

Managing Editor
Caleb Nelson

Assistant Managing Editor
Jeremy Fand

Assistant Editor
Mollie Kenny

Assistant to the Editors
Deborah Barrass

Editorial Office
1112 16th Street, N.W., Suite 530
Washington, D.C. 20036

Subscription Office
The Public Interest, Department PI
P.O. Box 3000
Denville, NJ 07834

Newsstand Distributors
Bernhard DeBoer, Inc.
113 Centre Street
Nutley, NJ 07110

Ingram Periodicals, Inc.
1117 Heil Quaker Boulevard
La Vergne, TN 37086

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The congressional brainwashing machine

JAMES L. PAYNE

WHY DO CONGRESSMEN support all those spending programs? At least among conservatives, the popular theories rest on the assumption that congressmen are, in one fashion or another, corrupt. Some say that voters in general want spending programs, and congressmen acquiesce in order to keep their seats and all the related privileges. Others say that the electoral pressures come from special-interest voters. Still others point to campaign donations or to simple bribes.

The common assumption of all these explanations is that congressmen are going against their better judgment when they vote for spending. The typical congressman is presumed to know, in his heart of hearts, that the spending in question is wasteful, unfair, or harmful, yet he ignores this conviction in order to feather his nest and to advance his personal career.

It's not my intention to be a torchbearer for American congressmen. They have many flaws. But if we seek an accurate picture of the spending problem, we have to realize that hypocrisy about spending programs is not one of them. For the most part, congressmen really believe in the spending programs that they

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

vote for. They think that these programs are responsible uses of taxpayer funds. In the following pages, I shall try to explain this observation.

The avalanche of pro-spending persuasion

During the Korean War, we first learned about how ordinary people can be persuaded to believe even the most outlandish ideologies by incessant one-sided propaganda. What happens in Congress on spending resembles this sort of brainwashing. Congressmen are exposed to a propaganda barrage in favor of spending programs. Of course, other influences are at work as well; our culture tends to consider government as society's problem-solver, and most congressmen reflect this orientation. But the pro-spending indoctrination that comes on top of this tendency gives us a Congress much more eager to support federal spending programs than ordinary Americans would be.

I first noticed the extreme one-sidedness of the congressional environment when I began a study of the hearings of congressional appropriations committees. I had intended to tabulate the arguments that witnesses were using for and against spending programs. As so often happens with research projects conceived in the abstract, this tabulation couldn't be made. The reason was that hardly anyone appeared to make arguments against spending.

So I changed my project and decided to count the ratio of witnesses appearing for and against specific spending programs. I took fourteen different hearings from a variety of House and Senate committees dealing with spending programs, and tabulated the orientation of each of the 1,060 witnesses toward the spending program under discussion. The results were dramatic. One thousand and fourteen witnesses appeared in favor of the spending; only seven could be classified as opponents. (The other thirty-nine were neutral, their testimony not bearing on spending one way or the other.) In other words, pro-spending witnesses outnumbered anti-spending witnesses 145 to one! When I pursued this point in interviews with committee staffers, I learned that my figures, if anything, understated the bias. It is their impression that program advocates outnumber program critics in the committee process "a thousand to one."

The avalanche of pro-spending persuasion directed at congressmen and their aides is felt not only in hearings, but also informally in meetings, phone calls, and correspondence. An assistant to a

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

border-state Democrat on the House Appropriations Committee described the pattern of personal contacts on the budget:

> We get the majority of the flow of our traffic—talking about the budget—after the President submits his budget in January. Then, after that point in time for about the next four to five months it's just a steady flow of people in here, coming in to talk about what they want in the budget and everything.
>
> Q. How many do you see, on the budget?
>
> A. Maybe five or six groups of people a day. It probably averages about that.
>
> Q. So you're saying hundreds of people?
>
> A. Yes. It's just like a revolving door.... Their message is the same on the budget. They may have different issues in their issue pack, like health benefits, or insurance, or whatever. But other than that, their message is the same.

I asked another aide, who worked for a southwestern Republican on the House Appropriations Committee, whether they ever received visits from opponents of specific spending programs:

> A. Me, specifically, as far as getting any visits from people who say, "Okay, when y'all have a markup of the Ag bill, oppose $15 million for this program"? We don't get anybody like that.
>
> Q. Really?
>
> A. We get hit continually with people who say, "You need to support x number of dollars for this program, the other program." We get hit quite a bit.

Government spenders justify government spending

A comprehensive look at who communicates with congressmen about spending reveals a striking, little-known fact: the persuasion process in Washington is highly inbred. The public supposes, because democratic theory says it should be so, that congressional views on spending are mainly affected by opinions and pressures from outside government—from the folks "back home" or from interest groups "out there." This is not the case. *Overwhelmingly, Congress's views on spending programs are shaped by government officials themselves.*

We can see this in my tabulation of witnesses at hearings. Of the 1,060 witnesses who appeared in the fourteen sets of hearings, 47 percent were federal administrators, and another 10 percent were state and local officials. An additional 6 percent were congressmen themselves—who, in a particularly incestuous practice, testify before each other's committees. In sum, 63 percent of the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

witnesses testifying on spending questions were government officials.

The other major group of witnesses, 33 percent of the total, were lobbyists for what most people would call "private" organizations. A closer look, however, reveals that these groups are to a large extent an extension of government. In the first place, the personnel are often former government officials. A survey of 776 Washington interest-group spokesmen by Robert Salisbury and Paul Johnson found that 55 percent had held some kind of government position—29 percent in the federal executive branch, 17 percent in Congress, and 9 percent in state and local government. Ordinary Americans rarely come to Washington to ask for government spending programs. The spokesmen for "private" interests are highly specialized officials with long service in and around government—and thoroughly socialized to a pro-government world view.

A second feature of the purportedly private groups is that they are funded to some degree by the federal government. In *Destroying Democracy*, James Bennett and Thomas DiLorenzo have tabulated the literally hundreds of well-known, supposedly private organizations that depend on governmental contracts and grants for part of their funding: the National Council of Churches, the National Education Association, People United to Save Humanity, the Gray Panthers, the League of Women Voters, the Sierra Club, the National Wildlife Federation; the list goes on and on. These are really "semi-governmental" entities, and their input on spending questions reflects this budgetary connection.

Another group that plays a role in spending are the consultants whom the government hires to study its programs. Program evaluation is a huge industry these days, costing the federal government about $2 billion a year, and providing employment and profits for scores of "Beltway bandits": Westat, Abt, Mathematica, and so on. In theory, these firms are supposed to provide objective evaluations of spending programs. But in practice, they are profoundly biased in favor of the programs that they evaluate. The reason for this partisanship is simple: the agencies hire their own evaluators! Agency administrators are careful not to pick evaluators who will pan their programs, and the consultants, for their part, are aware that submitting a really telling critique would blackball them in Washington forever. Their guiding rule is, as one researcher told me, "You don't want to antagonize the agency that's funding you."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

There are other links as well. On most consulting projects, the evaluators work closely with agency officials, getting clearance and guidance every step of the way. In addition, many of the researchers working for the consulting firms are past employees of the government and have already been socialized to favor spending programs. Others are prospective employees, using the consulting contract as a way of ingratiating themselves with agency officials.

As a result, Washington is flooded with hundreds of defective and biased policy evaluations supporting spending programs. In "cost-benefit" analyses, for example, researchers routinely exaggerate the benefits and understate the costs of spending programs. One ubiquitous error is that of ignoring the costs of the tax system. In other words, evaluators assume that a government dollar costs a dollar; they neglect the cost of running the IRS, the waste caused by the distorting effects of taxation, the tax-compliance burden, the tax-enforcement burden, and all the costs of tax evasion, tax avoidance, tax litigation, and so on. In a forthcoming study on the overhead costs of taxation, I have tabulated these different monetary costs, and they amount to about 65 cents for each dollar of taxes collected and spent! By ignoring these costs, generations of cost-benefit analysts have claimed that spending programs are worthwhile public investments when in fact they are not. Congressmen, who tend to be naive and uncritical about scientific-seeming studies, often end up believing and parroting such spurious "findings."

Even government agencies that are supposed to criticize programs wind up reinforcing the pro-spending tide. The General Accounting Office is a good example. In the first place, the GAO rarely hunts out problems with spending programs on its own. It comes on the scene, usually at congressional request, to redocument a problem already identified by complaints, indictments, and press reports. More of a decrepit hound than a watchdog, it has to be led by the nose to the expiring fox. Furthermore, in analyzing the problems with spending programs, GAO officials seem incapable of questioning the governmental approach to problem-solving. Their long service in and around government has made them dyed-in-the-wool statists, habitually committed to bureaucracy. To their way of thinking, most government programs can be fixed; it just takes "better management" and, often, more money. This orientation makes the GAO one of the most important pro-spending lobbies in Washington.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

For example, prompted by newspaper articles and the urgings of a liberal congressman, the GAO recently looked into government programs to prevent "sweatshops" by regulating wages and working conditions. What it found in New York City was eye-opening: in spite of over half a century of regulatory legislation, seven enforcement bureaucracies, and scores of inspectors, New York has more sweatshops than ever! In the apparel industry, among others, a clear majority of firms are sweatshops. Yet this massive policy failure never led GAO researchers to question the regulatory approach to improving the workplace; they did not consider the regulation's harmful effects in raising prices, creating unemployment, hurting minorities, facilitating corruption, and so on. They made no systematic effort to talk to employers, employees, independent analysts, or economists. Instead, they explicitly based their report on interviews with officials in the governmental enforcement bureaucracies. Not surprisingly, these officials contended that more government was the answer—more staff, more inspectors, and stiffer penalties for violations. And that was what the GAO told Congress.

The myth of agency neutrality

In budgetary theory, who is supposed to tell Congress and the public about flaws in spending programs? Washington budget participants have an answer to this question, an answer that—astoundingly—they actually believe. They think that the agencies themselves are impartial evaluators of their own programs! Under this theory of impartiality, congressmen give program administrators weeks and weeks in hearings to describe their programs and to justify proposed appropriations. Under this same theory, congressmen take at face value agency statistics and reports on program success.

This official theory of administrative neutrality is even believed in the Office of Management and Budget. Such budget cuts as are attempted normally originate there, and so one would suppose that OMB officials would be making the public case for what is wrong with the programs they are cutting. Not at all. Under the theory of agency impartiality, the task of defending budget cuts is left to the administrators in charge of the programs. As one OMB official put it, explaining why OMB remains mum about program defects: "We rely on the departments to go out and sell the President's budget. That's their job and it's their mission."

In practice, of course, agency officials are never impartial, for they face strong psychological pressures against objectivity. First,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

there is the effect of what psychologists call "dissonance avoidance." It is difficult to spend your life doing something you do not believe in. An agency administrator cannot go around believing that the program he heads is pointless or harmful. He will tend to twist, to rationalize, or to overlook evidence along these lines, or he will quit.

A second pressure involves group loyalties. Everyone closely connected with a government spending program knows about instances of waste, ineffectiveness, and harm. But these flaws are suppressed in the communications flow, because the people who know about them do not want to offend co-workers.

As part of my study, for example, I undertook to develop some anti-spending critiques to bring before congressmen. One of the programs that I criticized was the National Science Foundation (NSF). I interviewed many colleagues who had negative things to say, but none would allow me to cite him. A professor of political science at one major university, for instance, was highly critical of NSF political-science funding (which he had also received), on the grounds that the research being funded was mostly inept and was irrelevant to any important problems even when competently done. "If you ask me," he said, "they should cut the whole thing out, because even when the research succeeds, it still fails." I asked whether I could quote him in my upcoming congressional testimony. "Hell, no!" he replied. "I'd be run out of the discipline if they knew I'd said that."

The Economic Research Service (ERS) in the Department of Agriculture employs hundreds of trained economists who are supposed to study agriculture programs and to provide Congress with objective evaluations of them. In private interviews, I learned that these researchers were highly critical of most governmental agriculture programs, aware of their waste and absurdities. Yet these anti-spending views are kept out of ERS studies and congressional testimony. Why? As one researcher explained,

> You have to remember that if you're going to work here, you have to play the game. It's not like the agency will stop you from publishing [a controversial finding], but they'll tell you that it won't be beneficial for the agency if you do it. And you certainly don't want to get anybody put under the thumb, because that's just hard on everybody.

In refraining from blowing the whistle on program failures, an agency employee is protecting the jobs, careers, and projects of his colleagues, as well as his own future.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

For these reasons, administrators and others who benefit from funding are hopelessly biased sources of information and opinion about spending programs. Official budgetary theory flies in the face of common sense by placing the burden of program evaluation on them. It would be more logical to ban such self-interested people from participating in the budgetary process. That would turn the bustling halls of Congress into a mausoleum, because hardly anybody would be left to testify.

As it is, the dearth of program opponents means that on many issues, opposition to spending seems almost illegitimate. In one interview with a House Democrat on a committee that supervised the NSF, I mentioned that I would be testifying against this funding later in the year. "You *don't* want to fund the National Science Foundation?" he asked in disbelief. "I've never heard anybody say they didn't think NSF ought to be funded."

As this comment indicates, congressmen are aware of the one-sided environment in which they function. But they are disappointingly complacent about doing anything to correct the imbalance. They simply listen to anyone who presses his way into their consciousness. As we have seen, these contacts support spending programs at the rate of about 145 to one.

This picture of one-sided persuasion seems at first contradicted by the considerable public attention given to "spending" and "the deficit" in recent years. It is important to notice, however, that the spending problem that congressmen hear about is spending *in general*, spending in the abstract rather than spending for specific programs. In other words, congressmen are exposed to two distinct themes. One, by far the stronger message, says that specific programs are good. The other says that spending in general is bad.

The result is inconsistent fiscal policy, as congressmen attempt to respond to both pressures. Congress adopts measures, like the 1974 Budget Act and the Gramm-Rudman-Hollings bill, designed to limit spending in general. Then it undermines these measures by approving too much spending for the specific programs that make up the total budget. Congressmen are like dieters who agree that they ought to limit their general intake, but who find each food so tasty and attractive that they never accomplish this aim.

Empirical tests

Several points support this theory of congressional indoctrination on spending. One is the evidence about the attitude changes

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

that congressmen undergo in office. If congressmen are actually the victims of a brainwashing campaign on spending, then the longer they stay in Congress, the more they should favor spending. This is exactly what happens. The correlation between seniority and pro-spending attitudes gives a rough demonstration of the point: in both parties, pro-spending attitudes increase with longer tenure in Congress.

A comprehensive analysis of congressional attitude change, appearing in the December 1990 *Western Political Quarterly*, shows that the socialization effect is even stronger than rough seniority comparisons indicate. These rough figures lump together two types of congressmen: those who have served in other governmental offices and those who have not. The first group includes former congressional aides, former state legislators, and other officeholders who have already been exposed to pro-spending indoctrination. As expected, these people start out in Congress only slightly below the congressional average in their support for spending, and rather quickly come to favor spending as much as the average congressman. For individuals who have not served in other government offices, on the other hand, the socialization effect is dramatic. Their support for spending programs is far below average during their first years in Congress. Year by year their support for spending programs increases, but typically it does not reach the average level until they have spent twelve years in Congress.

Another datum that supports the persuasion theory is the spending behavior of retiring congressmen. Each session, a handful of congressmen step down, declining to run for reelection or for any other office. If electoral pressures were at the root of congressmen's votes for spending, the removal of these pressures should make them more fiscally conservative in their last year. This does not happen. Retiring congressmen go on voting for spending programs just as much as before. Why? Because they believe in them. Brainwashing produces genuine attitude changes; the effect persists even after the prisoners are released from captivity.

Can government-by-itself be stopped?

One-sided persuasion on spending represents, I believe, a common pattern for governments everywhere. The natural, normal state of affairs in government is for decisionmakers to be surrounded by, and persuaded by, other governmental and quasi-governmental officials. Since these officials have deep personal,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

social, and occupational commitments to government action, this inbred persuasion means that decisionmakers are constantly urged to maintain and to expand the role of the state.

Despite its importance, this pattern has received little attention. Government is normally viewed as an instrument, an organization commanded by a separate authority. The traditional labeling of governmental forms reflects this orientation. A king is said to rule in a monarchy, a nonregal single individual in an autocracy, a small group in an oligarchy, and "the people" in a democracy. *But who can be said to rule when government controls government?* In this case of circular government-by-itself, those working for and paid by government dominate the decisionmaking process themselves. Perhaps a new term is needed, something like "autonarchy."

Around the world, this pattern has a lot to do with the difficulties that people now face in trying to cut back the role of government. Imagine, for example, the results if Mikhail Gorbachev were to explore the possibility of decontrolling the manufacture of textiles in the Soviet Union. Who would do the studies? Who would write the reports? Who would be the witnesses? The persuasion process would be dominated by individuals from within the government, individuals from government planning agencies, from government textile bureaucracies, and so on. The backgrounds of these officials, their group and career interests, would lead them to favor the view that government management is necessary, that "chaos" would result from decontrolling textiles.

How can this broad tendency for governmental officials to monopolize the persuasion process be stopped? One method is to even up communications, to make sure that independent, nongovernmental figures have a say. In Congress, for example, committees considering spending programs should hear from as many witnesses criticizing the programs as favoring them.

The problem with this recommendation, of course, is that the motivation for testifying against spending programs just isn't there. Criticizing specific spending programs makes enemies of those directly and indirectly involved in those programs. There are few clientele groups that appreciate and reward the spending critic.

There is also an intellectual barrier, one that I discovered in my own efforts to oppose spending. When I would tell friends that I was going to Washington to testify against science subsidies or food stamps, they were puzzled and unsupportive. Why was I being such

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

a spoilsport? Was I against the march of science? Did I want to see people starve? In the modern welfare state, we tend to view government as a store, in which we can get the things we need. Going there in order to avoid getting anything seems irrational, and trying to prevent others from getting what they need seems meanspirited.

The idea of countering pro-government persuasion with anti-government persuasion is sound, and in the long run it would revolutionize both Congress's policymaking process and its policies. But this route is today an unpopular and arduous one.

A second way to counteract the congressional indoctrination process is to provide for the rapid rotation of decisionmakers. In order for brainwashing to work, congressmen have to be subjected to one-sided propaganda for a long time. Today, of course, they are, given the long tenure that they now enjoy. As former senator Howard Baker put it a few years ago, Congress has become "an assemblage of elected bureaucrats." "What I have been for most of the last 17 years," he said, "is a full-time federal employee with no business but government and no real home but Washington." The prolonged exposure to pro-government propaganda tends to bring congressmen into the orbit of the bureaucracy, so that instead of checking its growth, they become its patrons.

Placing limits on the congressional term would obviously help arrest this process of indoctrination, and give us a Congress less enthusiastic about using government to address social problems. The data relating seniority to spending indicate that a congressional term limitation would result in a somewhat lower level of federal spending.

The idea of limiting the governmental service of decisionmakers could be applied to executive officeholders as well, for the same problem of one-sided persuasion afflicts them as well. An assistant secretary who spends twenty years moving from federal job to federal job tends to become socialized in favor of government action. He cannot be expected to be objective in deciding whether government is needed to deal with this or that problem. It would be healthy for the republic if we prevented senior federal administrators from working for the federal government in any capacity (including Congress) for more than a combined total of, say, eight years.

The main objection to limiting terms of public officials is that it denies the government the benefit of experience. Of course there

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

is some truth to this. But what most people overlook is that there is a negative side to "experience." The long-term congressman or administrator may know more about past legislation and about who is who in Washington, but he will also be more biased in favor of federal government action.

In the early days of this nation, long service in government was considered pernicious, something that induced public officials to love government more than the people whom they were supposed to serve. It would be well if we could recover this skepticism today.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Congress-bashing for beginners

NELSON W. POLSBY

ON A SHELF not far from where I am writing these words sit a half a dozen or so books disparaging Congress and complaining about the congressional role in the constitutional separation of powers. These books date mostly from the late 1940s and the early 1960s, and typically their authors are liberal Democrats. In those years, Congress was unresponsive to liberal Democrats and, naturally enough, aggrieved members of that articulate tribe sought solutions in structural reform.

In fact, instead of reforms weakening Congress what they—and we—got was a considerably strengthened presidency. This was mostly a product of World War II and not the result of liberal complaints. Before World War II Congress would not enact even the modest recommendations of the Brownlow Commission to give the president a handful of assistants with "a passion for anonymity," and it killed the National Resources Planning Board outright. After World War II everything changed: Congress gave the president responsibility for smoothing the effects of the business cycle,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

created a Defense Department and two presidential agencies—the NSC and the CIA—that enhanced the potential for presidential dominance of national security affairs, and laid the groundwork for the growth of a presidential branch, politically responsive to both Democratic and Republican presidents.

Congress and the goring of oxen

Though it took time for the presidential branch to grow into its potential, the growth of this branch, separate and at arm's length from the executive branch that it runs in the president's behalf, is the big news of the postwar era—indeed, of the last half-century in American government. It is customary today to acknowledge that Harry Truman's primary agenda, in the field of foreign affairs, was quite successfully enacted even though Congress was dominated by a conservative coalition, and what Truman wanted in the way of peacetime international involvement was for the United States quite unprecedented. Dwight Eisenhower's agenda was also largely international in its impact. Looking back, it seems that almost all Eisenhower really cared about was protecting the international position of the United States from diminution by Republican isolationists. Everything else was expendable.

Congress responded sluggishly and in its customary piecemeal fashion. It was right around John Kennedy's first year in office that liberals rediscovered that old roadblock in Congress, a "deadlock of democracy," as one of them put it. It was Congress that had thwarted the second New Deal after 1937, the packing of the Supreme Court, and Harry Truman's domestic program; it was Congress that had stalled civil rights and buried Medicare; it was Congress that had sponsored the Bricker Amendment to limit the president's power to make treaties. Are memories so short that we do not recall these dear, departed days when Congress was the graveyard of the forward-looking proposals of liberal presidents? Then, Congress was a creaky eighteenth-century machine unsuited to the modern age, and Congress-bashers were liberal Democrats.

To be sure, Congress had a few defenders, mostly Republicans and Dixiecrats, who found in its musty cloakrooms and windy debates a citadel (as one of them said) of old-time legislative virtues, where the historic functions of oversight and scrutiny were performed, where the run-away proposals of the presidency could be subjected to the sober second thoughts of the people's own elected representatives, and so on.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Why rehash all this? In part, it is to try to make the perfectly obvious point that Congress-bashing then was what people did when they controlled the presidency but didn't control Congress. And that, in part, is what Congress-bashing is about now. Today, Republicans and conservatives are doing most (although not all) of the complaining. It is worth a small bet that a fair number of editorial pages claimed that the separation of powers made a lot of sense during the Kennedy-Johnson years—but no longer say the same today. On the other side, backers of FDR's scheme to pack the Court have turned into vigorous defenders of the judicial status quo since Earl Warren's time.

There is nothing wrong with letting the goring of oxen determine what side we take in a political argument. In a civilized country, however, it makes sense to keep political arguments civil, and not to let push come to shove too often. There is something uncivil, in my view, about insisting upon constitutional reforms to cure political ailments. What liberal critics of Congress needed was not constitutional reform. What they needed was the 89th Congress, which, in due course, enacted much of the agenda that the Democratic party had built up over the previous two decades. History didn't stop with the rise of the presidential branch and the enactment of the second New Deal/New Frontier/Great Society. President Johnson overreached. He concealed from Congress the costs of the Vietnam War. He created a credibility gap.

This, among other things, began to change Congress. The legislative branch no longer was altogether comfortable relying on the massaged numbers and other unreliable information coming over from the presidential branch. They began to create a legislative bureaucracy to cope with this challenge. They beefed up the General Accounting Office and the Congressional Research Service. They created an Office of Technology Assessment and a Congressional Budget Office. They doubled and redoubled their personal staffs and committee staffs.

Sentiments supporting this expansion began, oddly enough, after a landslide election in which the Democratic party swept the presidency and both houses of Congress. So mistrust between the branches in recent history has by no means been entirely a partisan matter. Nevertheless, Richard Nixon's presidency, conducted entirely in unhappy harness with a Democratic Congress, did not improve relations between the two branches of government. Johnson may have been deceitful, but Nixon,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

especially after his reelection in 1972, was positively confrontational.

It was Nixon's policy to disregard comity between the branches. This, and not merely his commission of impeachable offenses, fueled the impeachment effort in Congress. That effort was never wholly partisan. Republicans as well as Democrats voted articles of impeachment that included complaints specifically related to obstruction of the discharge of congressional responsibilities.

It is necessary to understand this recent history of the relations between Congress and the president in order to understand the provenance of the War Powers Act, the Boland Amendment, numerous other instances of congressional micromanagement, the unprecedented involvement of the NSC in the Iran-*contra* affair, and like manifestations of tension and mistrust between Congress and the president. These tensions are, to a certain degree, now embedded in law and in the routines of responsible public officials; they cannot be made to disappear with a wave of a magic wand. They are, for the most part, regrettable in the consequences they have had for congressional-presidential relations, but they reflect real responses to real problems in these relations. Congressional responses, so far as I can see, have been completely legal, constitutional, and—in the light of historical circumstances—understandable. The best way to turn the relations between the legislative and the presidential branches around would be for the presidential side to take vigorous initiatives to restore comity. As head of the branch far more capable of taking initiatives, and the branch far more responsible for the underlying problem, this effort at restoration is in the first instance up to the President.

President Bush and the item veto

In this respect, President Bush is doing a decent job, giving evidence of reaching out constructively. It is not my impression that the Bush administration has done a lot of Congress-bashing. After all, what Bush needs isn't a weakened Congress so much as a Republican Congress. Over the long run (though probably not in time to do Bush much good) Republicans are bound to regret despairing of the latter and therefore seeking the former. We have seen enough turns of the wheel over the last half-century to be reasonably confident that sooner or later Republicans will start to do better in congressional elections. The presidential item veto, the Administration's main Congress-bashing proposal, won't help Repub-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

licans in Congress deal with a Democratic president when the time comes, as sooner or later it will, for a Democrat to be elected president.

The item veto would effectively take congressional politics out of the legislative process, and would weaken Congress a lot. It would encourage members of Congress, majority and minority alike, to be irresponsible and to stick the president with embarrassing public choices. It would reduce the incentives for members to acquire knowledge about public policy or indeed to serve.

By allocating legislative responsibilities to Congress, the Constitution as originally (and currently) designed forces representatives of diverse interests to cooperate. Because what Congress does as a collectivity matters, legislative work elicits the committed participation of members. The item veto would greatly trivialize the work product of Congress by requiring the president's acquiescence on each detail of legislation. Members would lose their independent capacity to craft legislation. Their individual views and knowledge would dwindle in importance; only the marshalling of a herd capable of overturning a veto would matter in Congress.

The item veto is, in short, a truly radical idea. It is also almost certainly unconstitutional. To espouse it requires a readiness to give up entirely on the separation of powers and on the constitutional design of the American government. There are plenty of people, some of them well-meaning, who are ready to do that. I am not, nor should people who identify themselves as conservatives or liberals or anywhere in the political mainstream.

The separation of powers is actually a good idea. It gives a necessary weight to the great heterogeneity of our nation—by far the largest and most heterogeneous nation unequivocally to have succeeded at democratic self-government in world history. It would take a medium-sized book to make all the qualifications and all the connections that would do justice to this argument. The conclusion is worth restating anyway: the item veto is a root-and-branch attack on the separation of powers; it is a very radical and a very bad idea.

Term limitations

Less serious in its impact, but still destructive, is the proposal to limit the terms of members of Congress. This proposal relies heavily for its appeal upon ignorance in the population at large about what members of Congress actually do. For in order to take seri-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ously the idea of limiting congressional terms, one must believe that the job of a representative in Congress is relatively simple, and quickly and easily mastered. It is not.

The job of a member of Congress is varied and complex. It includes: (1) Managing a small group of offices that attempt on request to assist distressed constituents, state and local governments, and enterprises in the home district that may have business with the federal government. This ombudsman function gives members an opportunity to monitor the performance of the government in its dealings with citizens and can serve to identify areas of general need. (2) Serving on committees that oversee executive-branch activity on a broad spectrum of subjects (such as immigration, copyright protection, telecommunications, or health policy) and that undertake to frame issues of national scope for legislative action. This entails mastering complicated subject matter; working with staff members, expert outsiders, and colleagues to build coalitions; understanding justifications; and answering objections. (3) Participating in general legislative work. Members have to vote on everything, not merely on the work of their own committees. They have to inform themselves of the merits of bills, and stand ready to cooperate with colleagues whose support they will need to advance their own proposals. (4) Keeping track of their own political business. This means watching over and occasionally participating in the politics of their own states and localities, and mending fences with interest groups, friends and neighbors, backers, political rivals, and allies. (5) Educating all the varied people with whom they come in contact about issues that are high on the agenda and about reasonable expectations of performance. This includes the performance of the government, the Congress, and the member.

Plenty of members never try to master the job, or try and fail, and these members would be expendable. The objection might still be raised that constituents, not an excess of constitutional limitations, ought to decide who represents whom in Congress. But that aside, what about the rather substantial minority of members who learn their jobs, do their homework, strive to make an impact on public policy, and—through long experience and application to work—actually make a difference? Can we, or should we, dispense with them as well?

It is a delusion to think that good public servants are a dime a dozen in each congressional district, and that only the good ones would queue up to take their twelve-year fling at congressional

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

office. But suppose they did. In case they acquired expertise, what would they do next? Make money, I suppose. Just about the time that their constituents and the American people at large could begin to expect a payoff because of the knowledge and experience that these able members had acquired at our expense, off they would go to some Washington law firm.

And what about their usefulness in the meantime? It would be limited, I'm afraid, by the greater expertise and better command of the territory by lobbyists, congressional staff, and downtown bureaucrats—career people one and all. So this is, once again, a proposal merely to weaken the fabric of Congress in the political system at large, and thereby to limit the effectiveness of the one set of actors most accessible to ordinary citizens.

The standard objection to this last statement is that members of Congress aren't all that accessible. Well, neither is Ralph Nader, who has long overstayed the dozen years that contemporary Congress-bashers wish to allocate to members. Neither is the author of *Wall Street Journal* editorials in praise of limitations. And it must be said that a very large number of members take their representational and ombudsman duties very seriously indeed. This includes holders of safe seats, some of whom fear primary-election opposition, some of whom are simply conscientious. A great many of them do pay attention—close attention—to their constituents. That is one of the reasons—maybe the most important reason—that so many of them are reelected. Much Congress-bashing these days actually complains about high reelection rates, as though a large population of ill-served constituents would be preferable.

Congressional salaries

While we have Ralph Nader on our minds, it is certainly appropriate to pay our disrespects to his completely off-the-wall effort, temporarily successful, at the head of a crazed phalanx of self-righteous disk jockeys and radio talk-show hosts, to deprive members of Congress of a salary increase. The issue of congressional salaries is a straightforward one. Many members, being well-to-do, don't need one. But some do. The expenses of maintaining two places of residence—in Washington and at home—make membership in Congress nearly unique and singularly expensive among upper-middle-class American jobs. Here is the point once more: it is a job, requiring skill and dedication to be done properly.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Moreover, membership in Congress brings responsibilities. National policy of the scope and scale now encompassed by acts of the federal government requires responsible, dedicated legislators. People with far less serious responsibilities in the private sector are ordinarily paid considerably better than members of Congress. Think, for example, how far down the organizational chart at General Motors or at CBS or at some other large corporation one would have to go before reaching executives making what members of Congress do, and compare their responsibilities with those of Congress and its members. Actually, most corporations won't say what their compensation packages are like. But at a major auto company, people who make around $100,000 a year are no higher than upper middle management, and certainly don't have responsibilities remotely comparable to those of members of Congress.

There is a case for decent congressional salaries to be made on at least two grounds: one is the rough equity or opportunity-cost ground that we ought not financially to penalize people who serve, and the second is the ground of need for those members who have the expense of families or college educations to think of, and who have no extraordinary private means. The long-run national disadvantage of failing to recognize the justice of these claims is of course a Congress deprived of people for whom these claims are exigent, normal middle-class people with family responsibilities and without money of their own. These are not the sorts of people a sane electorate should wish to prevent from serving.

Members of Congress, knowing very well of the irrational hostilities that the proposal of a congressional pay raise can stir up, have taken the unfortunate precaution of holding hostage the salaries of federal judges, who are now ludicrously underpaid by the admittedly opulent standards of the legal profession, and senior civil servants. An unhealthy impasse has been created owing, at bottom, to Congress-bashing of the most unattractive kind, which exploits the ignorance of ordinary citizens of the dimensions of the members' working lives, and incites citizens to a mindless social envy, in which it is assumed that paying a decent professional salary to professional officeholders is automatically some sort of rip-off.

Members of Congress now make about $98,000. The bottom salary for major-league baseball players is $100,000. Some law firms in New York start new graduates of good law schools at

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

$90,000 or more. How can we argue that members of Congress and others at the top of the federal government should not be paid at least a modest premium above these beginners' wages? There is, evidently, no talking sense to the American people on this subject.

I believe we can dismiss out of hand the charge that large numbers of members individually, or Congress collectively, live in a world all their own, divorced from realities of everyday life. The sophomores who have written attacks of this sort in recent years in the *Atlantic*, *Newsweek*, and elsewhere simply don't know what they are talking about. They abuse their access to large audiences by neglecting to explain the real conditions that govern the lives of members, conditions that provide ample doses of everyday life.

No doubt scandals involving various members have in recent times made Congress as an institution vulnerable to criticism. But much of this criticism is irresponsible and irrelevant. Suppose we were to discover instances of cupidity, unusual sexual activity, and abuses of power among the rather sizable staff of an important daily newspaper? Or a symphony orchestra? Or, God forbid, a university? I suppose that would shake our confidence in at least part of the collective output, but one would hope for relevant discriminations. One might distrust the ticket office, perhaps, but not the symphony's performance of Mozart; the stock tips, perhaps, but not the Washington page; the basketball program, but not the classics department. I do not think that the existence of scandal excuses us from attempting to draw sensible conclusions about institutions and their performance.

This sort of balanced and discriminating analysis isn't what proposals for item vetoes, limitations on terms of service, or depressed rates of pay are all about. They are about the ancient but now slightly shopworn American custom of Congress-bashing.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The permanent Democratic Congress

NORMAN ORNSTEIN

ONE OF THE MOST enduring, puzzling, and contentious phenomena of modern American political life is the persistence of firm Democratic Party majorities in Congress even as the Republicans tighten their stranglehold on the White House. The enduring nature of the phenomenon can easily be seen with a few simple numbers. The Democrats have controlled the House of Representatives for thirty-six consecutive years, and fifty-six of the last sixty; they have run the Senate for fifty of the past sixty years. The Republican Party, meanwhile, emerging in 1952 from the desert of two decades outside the White House, has successfully held the presidency seven of the past ten terms, including three in a row and five of the past six. Since 1954, the United States has had eighteen years with a Republican president and a Democratic Congress, six years with a Republican president and Senate and a Democratic House, and only twelve years with a president and Congress of the same party.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The phenomenon has puzzled more than a few observers because it seems so irrational, even perverse. While coalition governments are common in parliamentary democracies, a stark division of powers not only between institutions but also between parties was nearly unknown in the parliamentary world until the recent French experiment with "cohabitation." Even seasoned American observers have a hard time understanding or explaining how voters can opt enthusiastically and overwhelmingly for a Republican president—who has campaigned by asking for a Congress he can work with—and then turn around collectively and choose by an equally overwhelming margin a Congress run by precisely the people he has asked them to reject. Indeed, the most common explanation has been that the electorate is not consciously making these choices, but is either forced by electoral mechanics or gulled by partisan congressional wiles to behave schizophrenically.

It is not surprising that the phenomenon of divided government breeds contention; neither Democratic nor Republican partisans are happy with the humiliation implicit in a long string of electoral defeats, or with the loss of power and position in major national institutions. Democrats, the Denver Broncos of American presidential politics, are fearful that several generations of their talented youth will be shut out of any opportunity to occupy high executive-branch office, leaving the party potentially without experienced elder statesmen into the twenty-first century. Meanwhile, Republicans, the Chicago Cubs of congressional politics, have not a single member of the House of Representatives who has ever been in the majority, with Republican Leader Bob Michel sharing (with colleague William Broomfield) the dubious distinction of a record-breaking thirty-four consecutive years in the minority.

There are many reasons to explore the phenomenon of the persistent Democratic Congress through an era of Republican presidencies. There is the scholarly puzzle—sorting through why it exists. Beyond this interesting if rather academic issue lie other serious political, constitutional, and policy questions. Among other things, the persistent Democratic Congress has led to increasing frustration, and resulting hostility, among conservatives toward the First Branch of government.

For many, this phenomenon has called into question the very legitimacy of the Congress itself. Since the phenomenon cannot be natural, the unnatural causes and consequences must have produced a chamber far removed from what the Framers intended,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

one so unrepresentative of the public's desires and wishes that it should be denounced, delegitimized, and defanged.

At the same time, the phenomenon has led to several new schools of constitutional thought. For decades, the staunchest defenders of Congress were American conservatives, who generally agreed with James Burnham, one of the leading figures in conservative thought, whose book *Congress and the American Tradition* was a forceful, well-documented, and persuasive defense of Congress's constitutional prerogatives against the presidency. In recent years, confronted by a presidency increasingly occupied by one friendly to conservatives and a Congress uniformly run by people and a party hostile to them, many conservatives have reread the constitutional scriptures and found new meaning in them, meaning that turns Burnham's book on its head.

This would be no more than an interesting and amusing example of situational constitutionalism (the exact opposite hypocrisy, of course, is found among newly energized liberal defenders of Congress) were it not for the fact that many conservatives now propose major constitutional reforms. Some, like the line-item veto, are designed to enhance presidential authority and to weaken congressional prerogatives. Others, such as a limit on congressional terms, are aimed more directly at altering the longstanding balance of power in Congress.

Beyond these kinds of struggles, though, the persistent pattern of power unquestionably has also altered political dynamics and party psychology in Washington, shaping our policy processes and their outcomes. For all these reasons, a careful examination of the permanent Democratic Congress is in order.

Explaining the permanent Democratic Congress

American history has mostly consisted of alternating eras in which one party dominates, rather than continuing close competition between parties that frequently alternate in office. Most political historians divide the two centuries of American life into five distinct eras (or systems) of party dominance, each of which ended with a party realignment. Of course, the dominance was never pure and frequently involved different patterns for Congress than for the presidency, but it was still usually clear which party was in the majority in the country. The modern era of American politics is different. While scholars have disagreed about whether recent decades have been characterized by a realignment or a dealign-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ment, the divisions in power among the parties and institutions are very unusual, particularly in Congress. The Democrats' string of eighteen consecutive terms of majority in the House is twice as long as any other string, for either party, since the Civil War.

Why this unprecedented rule for the Democrats? To Republicans and many other observers of American politics, this Democratic success—especially through the 1980s, when Republican party identification grew and Republican presidential control and popularity expanded—cannot be a natural phenomenon, or a reflection simply of Democratic political skill or Republican organizational failure. The key question for them is, why didn't national Republican popularity translate into congressional strength?

One of the most widespread and popular theories is that the powers and perks of incumbency in Congress, which have grown exponentially in the past two decades, have created a situation in which incumbents cannot be beaten except under the most extreme circumstances. Since the Democratic Party has more incumbents and controls the system of power and perks, it has been able, by dramatically increasing the incumbent advantage, to institutionalize its majority, insulating it from normal political pressures and, in effect, mesmerizing voters to the point that they cannot hear an alternative message.

This latter assertion is what gives particular bite to the incumbency explanation for contemporary Democratic dominance of the House. It suggests directly that the advantages of incumbents have grown so far beyond the "normal" or usual pattern that incumbents win even where voters really don't want them to—in other words, that the strong Republican tides in presidential politics would have washed over Congress if it weren't for the huge supply and size of the incumbency sandbags erected in the last several years.

Proof for this contention comes from the astonishing success rates for incumbent House members, particularly in the past two elections (98.0 percent and 98.4 percent, respectively); the growing number of House members winning elections by large margins; and a catalogue of the impressive perquisites, from staff to mailing allowances and television studios, available to lawmakers. In addition, incumbents have increasingly succeeded in raising the substantial sums of money needed to run modern congressional campaigns, especially money from organized sources like political action committees, while challengers have had an increasingly rough time.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The success rates for incumbents, the phenomenon of the "vanishing marginals," the perquisites of incumbency and the widening money gap—all are quantifiable and demonstrable. There can be no question that incumbency provides enormous advantages; it at least partially explains the phenomenon of Democratic one-party control. At best, however, it is an incomplete explanation. To begin with, reelection rates for incumbents in the House have been high for more than a century, and have averaged more than 90 percent for several decades at least; they changed little with the expansion in incumbent perquisites or the alterations in campaign financing. The mid-1950s, the late 1960s, and the mid-1970s each saw a string of elections with reelection rates in the mid-nineties, each followed by elections with more incumbent defeats. It is true that the mid-1980s cycle has a marginally higher level of incumbency success than previous ones and that the cycle is likely to persist through four elections, whereas in the past only three elections were usually strung together; but then the mid-1980s have also witnessed an unusually high and sustained level of voter satisfaction with the status quo.

Persistent high rates of incumbency reelection tell us that incumbency is a powerful tool. But its power goes back many decades, before this unprecedented Democratic string. We have unquestionably seen incumbency solidify as a political phenomenon. But a sharper change than we have seen would be required before we could credit the modern revolution in congressional support for Democratic congressional hegemony.

A major part in the revolution in incumbent advantage, moreover, has come not from mechanical advantages but from the political savvy, energy level, and drive of modern politicians—people who undeniably take advantage of the perks available to them, but who also know how to reach their constituents with communications, insights, concerns, and work products that will succeed. We have some evidence to suggest that the infamous class of 1974—the "Watergate Babies"—advanced and expanded the use of innovative political techniques to solidify their own sometimes precarious positions back home, with mobile district offices, twenty-four-hour constituent hotlines, and other modern marketing techniques. Whether they were pioneers or not, they and their contemporaries knew how to communicate and campaign. As the average age of members of Congress has declined (contrary to conventional wisdom, we have one of the least geriatric Con-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

gresses in modern times), the energy level has probably risen; combined with much more and more-regular jet transportation out of National Airport, which lets lawmakers spend full weeks in Washington and still have a highly visible and energetic presence in their districts, we have a formula for incumbent popularity back home.

In a recent issue of *U.S. News & World Report*, Michael Barone reported on his visits to the districts of two Democratic House incumbents who have been regular targets of Republican campaign committees, Robert Carr of Michigan and Tom Downey of New York. Barone portrayed two energetic, intelligent, and attractive individuals who understand and respond to the local issues that matter most to their constituents, and whose style, openness, and drive overcome some of their liberal positions in the minds of many more-conservative voters. Carr and Downey would doubtless have more trouble without the staff, franking privilege, and other benefits available to every incumbent—but even without the perks, Barone's reporting shows, they would not be easy to beat.

Testing the incumbency theory

Incumbents' advantages can be examined from many angles. As with Sherlock Holmes's insight about the dog that didn't bark, the most significant evidence that bears on the role of incumbency may come from the seats that have no incumbents—the open seats. If the most pointed theory of incumbency advantage is true—if Republican majorities have been thwarted by the shield of incumbency—then we should find major Republican successes *where those advantages are absent*. We don't.

If the incumbency theory holds true, there should be many seats previously held by Democratic incumbents that go over to the Republicans when the incumbents leave those seats—and many fewer open seats held by Republican incumbents going over to Democrats when those seats open up. But the reality is the opposite. As Table I shows, since 1954 Republicans have won 77 open Democratic seats in the House of Representatives; Democrats during the same time period have won 101 open Republican seats—or 57 percent of the total party turnovers in the open seats. Republicans did do much better than their overall average in the tidal years of 1972 and 1980—but they did not distinguish themselves in the remainder of the seventies and eighties, including George Bush's victory year of 1988.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Table I. Open House Seats Changing Party, 1954-1988[a]

Year	D→R	R→D
1954	2	3
1956	2	4
1958	0	14
1960	6	6
1962	2	3
1964	5	8
1966	4	3
1968	2	4
1970	6	8
1972	9	5
1974	2	13
1976	3	7
1978	8	6
1980	10	1
1982	3	5
1984	5	1
1986	7	8
1988	1	2

[a]Source: *Vital Statistics on Congress, 1989-1990.*

If the incumbency theory were correct, we should also see a pattern of GOP success in *special elections*, with seats opened up in the middle of the election cycle because of an incumbent's death or resignation. Since 1954 there have been 188 special elections to the House; the GOP's net gain from these elections has been four seats. Since Ronald Reagan's election in 1980, there have been thirty-three special elections to the House; the GOP has made a net gain of one. In short, there is no evidence here for a GOP tide thwarted solely by incumbent advantages.

True, if there were no incumbent advantages, the race for majority in the House would be considerably tighter; Republicans, after all, have more or less kept parity with the Democrats in open seats. But that is like saying that if there were no seven-foot-tall players in the National Basketball Association, the Washington Bullets could win the championship. Incumbents could be outlawed from Congress, just as seven-footers could from the NBA, but until then guile and discipline are required to overcome their natural advantages.

Why haven't Republicans done better in open seats? Proponents of the incumbency theory often point to *gerrymandering*, the partisan drawing of the boundaries of congressional districts. The claim is that the redistricting process has been rigged to create safe

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

seats for each party, so that the opposition can't win even when incumbents leave. It is true that the vast majority of open seats, like the vast majority of incumbents' seats, do not change party in a given election (a phenomenon that precedes this era of Democratic control). It is also true that more seats have become safe for both parties in recent decades. But many open seats still do change parties, and if the theory of an underlying Republican majority were correct, more of them would change toward the Republicans than toward the Democrats.

There are other explanations—starting with the parties' political will and skill. If latter-day incumbents are nearly impossible to beat, then political parties have to devise other strategies to win seats in Congress. They must target and challenge those incumbents who are vulnerable for reasons of age, scandal, inattention to constituent concerns, or voting record, and they must lay the groundwork necessary to win a district when an invulnerable incumbent leaves office. This means having an experienced, well-known candidate in place at the right time, with an experienced campaign team that knows the district's geography and politics.

The latter strategy means viewing congressional elections as investments; often it requires fielding and financing a candidate who cannot win, in order to build experience and name recognition for a second try. Republicans have consistently failed to do so. Consider, for example, the number of *uncontested seats*—seats held by one party where the opposition fails to put up even a token challenge. In most cases, obviously, seats go uncontested because incumbents are so strong that a challenger would have little if any hope of succeeding. But incumbents do not live forever; failing to challenge them means failing to create congressional campaign organizations and to cultivate viable candidates to run when the chance of winning increases.

From 1978 to 1988, on average, 14 percent of races for the House of Representatives went uncontested. Of these a total of 281 were held by Democrats—while only eighty-four were held by Republicans. In 1988 alone, fifty-eight Democrats were unopposed compared to only twenty Republicans. Most of the unopposed Democrats were Southerners, usually from conservative districts; it is no wonder that Republicans have at best a mediocre record at winning Southern open seats.

One of the races left uncontested in 1988 was that of House Speaker Jim Wright, despite the conservative nature of his Fort

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Worth district and the fact that the House investigation of allegations of ethics violations had begun well before the election's filing deadline. When Wright resigned in 1989 and a special election was held to fill the seat, Republicans had neither an experienced candidate with name recognition nor a competent staff in place. As a result, they narrowly lost an election that offered a golden opportunity for a major GOP victory; they now have much less chance to defeat the new incumbent, Democrat Pete Geren, in 1990.

Of course, few critics of incumbency advantages are motivated simply by partisan or ideological concerns. Many believe that incumbents from both parties in Congress have engaged in symbiotic, if not conspiratorial, behavior to harden their silos against any outside challenge. This, congressional critics charge, has so limited turnover in Congress that even the Supreme Soviet has more openness and fresh faces by comparison.

To one who walked the corridors of the Capitol in the late 1960s, the heyday of the seniority system when greybeards were omnipresent, the idea that today's Congress is notably geriatric and unchanging is laughable. A glance at the House floor in the 101st Congress shows many more young faces than old—a casual impression of turnover that is borne out by the numbers. Turnover in Congress has many causes—retirements, runs at other offices, deaths, defeats in primaries—and the turnover in the past two decades has been high.

As House Speaker Tom Foley has pointed out, 93 percent of the House's members arrived after he did in 1965; 81 percent began serving after 1974, and 55 percent were first sworn in during the past decade. Since 1955, the average number of senior House members—those having served seven terms or more—has been 138, or 31.7 percent; the current number is 146, or 33.6 percent of the House. The number of senior lawmakers was much lower in the mid- and late 1970s, after many retirements and a series of elections in which more incumbents were defeated because many voters wanted change. The last few elections—1984, 1986, and 1988—reflect the cyclical changes typical of American politics: fewer retirements, since the pool of likely retirees is smaller; fewer incumbent defeats, since voters opt largely for the status quo. We do not require constitutional change to expect more retirements and more incumbent defeats in the early or mid-1990s, as the retirement pool is replenished and voters opt for change.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Certainly, as David Broder has pointed out, turnover does not mean competition, and competition has clearly declined in the House; fewer and fewer House seats are closely contested from one election to the next. This is a real and vexing problem, one that stems more from the difficulties of securing good challengers than anything else. I discuss some of the recruitment problems below, but it is worth emphasizing here that more competitive House elections will require new campaign-finance laws that make it easier for challengers to raise the money necessary to run serious races in large and diverse districts. The main thrust of most reformers, including Common Cause and the Democratic Party, is to limit spending on elections. Well-meaning or not, spending limits would almost certainly harm challengers, limiting their ability to get their messages across in districts that require sizable sums of money to do so.

Incumbent advantage could be dramatically reduced by forcing incumbents out through a constitutional amendment limiting terms of service. To do so would solve a problem, lack of turnover, that doesn't exist; would drastically shorten the institutional memory of the Congress, encouraging historical policy mistakes to repeat themselves; and would tremendously increase the clout of congressional staff, lawyers, lobbyists, pundits, bureaucrats, public-relations specialists, journalists, and other permanent denizens of the Capitol whose terms of service are not limited. It would probably bring into Congress a group of overly ambitious people viewing the job not, as the amendment's proponents believe, as a station on their way back to normal life in their communities, but as a stepping stone to higher office or major money. They would have little stake in the House as an institution, and little incentive to think about the broader and longer-term implications of their actions. Perhaps current members also lack those incentives, but a constitutional amendment should promise something more.

The gerrymandering theory

The evils of gerrymandering have been a favorite target of political reformers for decades; increasingly, they have been joined by Republican Party officials and conservative ideologues like the editors of the *Wall Street Journal*, who charge that gerrymandering has wildly distorted the House and made it an unrepresentative institution. Republicans and the *Journal* have been particularly exercised over the fact that the Democrats' percentage of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

seats in the House of Representatives has consistently exceeded their nationwide proportion of votes—evidence in their minds (not to mention their fundraising literature and editorials) of the unfair bias created by partisan Democratic gerrymandering.

There is no question that a clever and ruthless partisan who controls redistricting can wreak havoc on the opposition party. Democrats, led by Phil Burton, did so in California after the 1980 census; Republicans returned the favor in Indiana. But there are precious few additional examples that show clear-cut and extreme partisan advantages. Indeed, the single largest effect of redistricting around the country tends to be the bipartisan agreements in most states that end up protecting incumbents of both parties from the kinds of colossal shakeups that would create larger turnover.

As for the celebrated gap between votes and seats, its notoriety, along with the broader attack on gerrymandering, has stemmed largely from a misunderstanding of the inherent nature of the American political system, along with a lack of understanding of basic differences between Democratic and Republican voters.

The American political system, like the British system, is one of single-member, "first past the post" districts. Each has one winner, usually the one who captures the most votes (some have thresholds and run-off provisions). All such systems have a built-in votes/seats distortion: the party that gains a majority or plurality of the votes cast nationwide will almost certainly win a greater proportion of seats.

Why is this the case? Political scientists and mathematicians have written many books quantifying the reasons and the relationships. To be simple and brief, a first-past-the-post system means a lot of "wasted" votes—but fewer for the more successful party. Candidates who win with 51 percent of the votes "waste" a few of their votes; they needed only 50.1 percent to win. Candidates who lose with 49 percent of the votes "waste" all their votes; the result would have been the same if the candidates got zero.

In a system like ours, each party ends up with a lot of candidates who get 45 percent of the votes and end up with nothing, and a lot of candidates who get 80 percent of the votes and win when 50.1 percent would do. The variations, however, do not exactly cancel each other out. All things being equal, if a party in a two-party system captures 52 or 53 percent of the votes, that party is likely to end up with 55 or 56 percent of the seats, having been more efficient at translating its support into winning seats.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The skew can be even greater if a third party seriously contests an election. Margaret Thatcher's Conservatives, for example, won a staggering 58 percent of the seats in the British House of Commons—with barely more than 40 percent of the votes! (The *Wall Street Journal*, for some reason, has never questioned the Thatcher government's legitimacy on this basis.)

Through twenty-two elections in the United States since 1946, the average "bonus" for the majority party has been 6.2 percent more seats than votes. Since the "outrageous" gerrymandering after the 1980 census, the average bonus has been 6.0 percent—*less*, in other words, than the overall postwar average! On the one occasion in this modern era that the Republicans captured a majority of votes, they also took advantage of the built-in bonus. In 1946 Republicans captured 53.5 percent of the votes cast nationwide, and received 56.7 percent of the seats in the House, a bonus of 3.2 percent.

Why would the GOP bonus have been less? Other evidence suggests that Democrats generally tend to do better than Republicans in the votes/seats ratio—but not for malevolent reasons of gerrymandering. Rather, there are simple differences in the natural bases of party support. Democrats, not surprisingly, tend to attract votes more from poorer, worse-educated, and more minority-based constituencies than do Republicans. Their voters turn out less—and their districts, as a result, have lower turnout.

Assume that you have two fairly drawn districts of equal population, one a poor inner-city district that elects a Democrat, the other an affluent suburban district that elects a Republican. In the former district, 150,000 voters turn out; in the latter, 225,000. The Republicans have captured 60 percent of the votes cast in these two districts, but only 50 percent of the seats. Is that inappropriate? Not by most standards.

Table II shows the distribution, by levels of voter turnout, of contested seats won by the Republican and Democratic parties in the 1988 congressional elections. To summarize it, Democrats won 110 of their contested seats—54.5 percent—in districts where fewer than 200,000 people voted. Republicans won only 49 of their seats—31.6 percent—in such districts. In contrast, Republicans won 35.5 percent of their seats, fifty-five in all, in districts where more than 225,000 people voted; Democrats won only 19 percent of their seats, or thirty-eight, in such high-turnout places. The differences in party bases, and in the resulting district turnouts, alone

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

account for many of the differences between seats and votes, leaving the natural bias of the first-past-the-post system to account for less than the standard formulae might suggest. Indeed, given that the average bonus in the 1980s was less than the forty-four-year norm, one might even argue that the Republicans, not the Democrats, won the redistricting wars of the past decade.

Table II. Contested House Elections in 1988[a]

Turnout	Democratic Winners	Republican Winners
Less than 125,000	9	0
125,000 - 150,000	13	2
150,000 - 175,000	38	6
175,000 - 200,000	50	41
200,000 - 225,000	54	51
225,000 - 250,000	24	31
250,000 - 275,000	7	13
More than 275,000	7	11

[a]Source: *Congressional Quarterly's Weekly Report*, May 6, 1989. There were seventy-eight uncontested elections.

Bonus or no, the overall Republican problem in failing to win the House is best characterized by another set of numbers. Since 1952—the last time the GOP had a majority in the House—it has averaged only 45.3 percent of the votes cast nationwide. Except for 1956, when the Republicans captured 48.7 percent of the votes cast, the party has not exceeded 48 percent in the past thirty-six years. The GOP, in other words, has not come close during its entire period of minority status to winning a majority of votes for the House. During this same era, the Republican Party has averaged 53.1 percent of the votes cast for president. A prime explanation for this disparity is the quality of congressional candidates.

Republicans and recruitment

In a broad sense, the Republican failure to win more House seats is directly related to a lack of success at candidate recruitment. Over the past several election cycles, the Republican Party has had great difficulty recruiting consistently top-flight candidates to run for the House of Representatives, either to challenge incumbent Democrats or to run for open seats. The reasons include:

•*the vicious cycle*. A party that is in the minority can offer potential candidates fewer incentives than the majority party, which can hold out the prospect of future subcommittee or committee chairmanships, extra staff, and other perks of majority status.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The longer the GOP has been in the minority, the more remote look its chances of vaulting into the majority, and the more difficult it is to get ambitious people to be lured to run—and as a result, the longer it continues to occupy the minority.

•*the partisan culture.* While one must be careful about overgeneralizing, it is nonetheless clear that cultural definitions of career desirability and success vary between the parties. For the Republican Party's best and brightest, the careers of choice are business, commerce, or the professions. Politics, especially in Washington, is not high on the list. For Democrats, a career in politics or government is much more highly prized. This difference is partly a matter of:

•*philosophy.* To a considerable degree, the Republican philosophical and political message for the past several decades has been, to put it simply, "Let's get government in Washington out of our lives." To recruit for Congress based on that message means saying to a prospective candidate, "Spend your life in government in Washington."

•*political reforms.* Well-intentioned, necessary, and important though they may be, there is no question that the web of conflict-of-interest and financial-disclosure requirements put into place in the 1970s and 1980s has made it more difficult to recruit people for public service in Washington, especially for elective office. The more complicated one's life and finances, the more sacrifices are now required to run for and to serve in high office, and the more likely one is to be reluctant to bare all for open public scrutiny. While this phenomenon affects both parties, Republicans, who tend to turn more to business executives and entrepreneurs, are affected more.

•*the GOP executive branch.* Many of the Republican Party's best and brightest who are interested in politics and public service have an alternative to running for Congress—namely, an appointive position in the executive branch. An appointment as an assistant secretary or deputy administrator of an agency may require financial sacrifice and Senate confirmation, but it involves more authority than minority membership in Congress and it does not require the fundraising, time commitment, and politicking necessary to run a competitive race for Congress—which still may not succeed. Ambitious and politically attuned Democrats, by contrast, have no executive alternative; for them Congress is the only game in town.

To be sure, the Republican Party's top political figures are aware

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of many of these problems, and they have taken steps to rectify them. Perhaps the most significant move was that of Ed Rollins into the top slot of the National Republican Congressional Committee (NRCC), where he has begun aggressively to target vulnerable Democratic incumbents, including those who may require two election cycles to defeat, and to recruit and finance top-flight candidates with name recognition and political skill, pledging to support them over more than one election, if necessary. This is a sharp departure from GOP practices of the past, and the change has not come easily; Rollins has been attacked vigorously by many Republicans more comfortable with the previous easy ways. But if Rollins is given the time and resources, his efforts are likely to bear fruit down the road.

At the same time, a number of Republicans like Jack Kemp, Vin Weber, Bill Gradison, and Newt Gingrich have been trying to find a more positive message for the Republican Party that goes beyond simply getting Washington off our backs and government out of our lives. These efforts may make for a more exciting message, and may increase the number of people eager to devote much of their lives to acting upon it.

At least some of the Republican support for the congressional pay raise in 1989, moreover, stemmed from the recognition that it would help recruit good candidates for Congress. And there is more openness in Republican ranks to significant changes in the campaign-finance laws that go beyond heavy-handed and unrealistic mechanisms designed simply to punish Democrats or to hobble incumbents; significantly, some of the proposed changes even involve tax credits—indirect public funds—to foster more competition in congressional elections.

All of these things should and will make a difference. But there is another, ironic, roadblock for the Republican Party to consider.

Countercyclical politics

In the 130 years of American political history since the start of the Civil War, we have had eighty years in which the presidency and both houses of Congress were held by the same party, twenty-two years in which the presidency and one house of Congress were held by the same party, and twenty-eight years in which one party held the presidency and the other held both houses of Congress; the last arrangement, of course, has mostly occurred in recent years. But through each of these political arrangements, across

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

different eras of modern American history, one relation has held almost universally constant: *the longer a party holds the White House, the worse it does in Congress.*

Every party has left the White House with fewer members of Congress than it had when it entered. The Republicans held the presidency from Lincoln's election in 1860 until Grover Cleveland's election in 1884. When Lincoln was inaugurated, his party held 59 percent of the House of Representatives; after the 1882 election (the last before the GOP's 1884 departure from the White House) it held 36.3 percent of the House. The GOP held the White House again from McKinley's election in 1896 until Wilson's election in 1912. It began this era of presidential control with 57.1 percent of the House; its last election in control left it with 41.3 percent. Woodrow Wilson, conversely, began his two terms as Democratic president with 66.9 percent of the House; after his sixth-year election, his party held 43.9 percent. (In every case, incidentally, the percentage took an additional sharp dive with the following presidential-election year.) Table III shows the figures from Warren Harding to the present.

Of course, part of what is reflected in these numbers is the well-known phenomenon of the midterm loss for the president's party: in every off-year election save one since the Civil War, the president's party has lost seats in the House. But we also see two other phenomena at work: a party almost never regains as many seats in its president's reelection year as it lost in the previous off-year contest, and the losses in the second midterm election of a two-term president—the fabled "six-year itch"—are nearly always greater than in the first.

I lack the space in this article to explain in detail why the midterm-loss and six-year-itch cycles occur. Put in the simplest terms, though, when things are going badly, especially in the economy, as they often are in a president's second and sixth years, the public will blame the president's party; but when things are going well, as they usually are when an incumbent president gets reelected, voters are inclined to give a pat on the back to all incumbent office seekers. In off years, most presidents and their parties find themselves on the defensive; in presidential reelection years, presidents run by proclaiming that "things are good, let's keep them that way." Differences between turnouts and party coalitions in presidential and in off-year elections, as well as cycles of candidate recruitment, also account for midterm losses.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Table III. Presidents and Congressional Seats, 1920-1988[a]

		President's Party		Opposition Party	
President	**Year**	**Percent**	**Number**	**Percent**	**Number**
Harding (R)	1920	69.5	301/433	30.2	131
Coolidge (R)	1922*	51.7	225/435	47.1	205
	1924	56.9	247/434	42.2	183
	1926*	54.5	237/435	44.8	195
Hoover (R)	1928	61.4	267/435	38.4	167
	1930*	49.2	214/435	50.6	220
Roosevelt (D)	1932	71.8	310/432	27.1	117
	1934*	73.8	319/432	23.8	103
	1936	76.4	331/433	20.5	89
	1938*	60.8	261/429	38.2	164
	1940	62.5	268/435	37.2	162
	1942*	50.7	218/430	48.4	208
	1944	55.8	242/434	43.8	190
Truman (D)	1946*	43.3	188/434	56.4	245
	1948	60.4	268/435	39.3	171
	1950*	53.9	234/434	45.8	199
Eisenhower (R)	1952	51.0	221/433	48.7	211
	1954*	46.7	203/435	53.3	232
	1956	46.2	200/433	53.8	233
	1958*	35.1	153/436	64.9	283
Kennedy (D)	1960	60.2	263/437	39.8	174
	1962*	59.3	258/435	40.7	177
Johnson (D)	1964	67.8	295/435	32.2	140
	1966*	56.9	247/434	43.1	187
Nixon (R)	1968	44.1	192/435	55.9	243
	1970*	41.5	180/434	58.5	254
	1972	44.4	192/432	55.3	239
Ford (R)	1974*	33.1	144/435	66.9	291
Carter (D)	1976	67.1	292/435	32.9	134
	1978*	63.7	276/433	36.2	157
Reagan (R)	1980	44.1	192/435	55.9	243
	1982*	38.0	165/434	62.0	269
	1984	41.9	182/434	58.1	252
	1986*	40.7	177/435	59.3	258
Bush (R)	1988	40.2	175/435	59.8	260

(*) indicates off-year election.

[a]Source: *Congressional Quarterly's Guide to U.S. Elections*, Second Edition.

The cycle of presidential elections and off years has persisted for well over a century; yet in no other period of partisan dominance of the White House did the opposition party grab longstanding control over Congress. What makes the contemporary era unique? The roots lie in the 1930s and the 1950s, the Roosevelt and Eisenhower eras.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The drama of the Great Depression, coming after a decade of uniform Republican control, gave the Democrats a huge margin of power to work with in 1932. The Democrats had captured the House in 1930, after the 1929 crash; with the landslide of 1932, their edge increased overwhelmingly, to 72 percent of the membership. Both Woodrow Wilson and his successor, Warren Harding, had entered the White House with margins in the House of Representatives nearly as large—but they fell back dramatically in the off-year elections of 1914 and 1922, respectively.

1934 was different. For the only time in modern history, a president's party actually gained seats in the House in the off year. Democrats moved to 319 seats, or 74 percent of the total, and expanded to 331 seats, or more than 76 percent with FDR's reelection in 1936. (Democrats also held nearly 80 percent of the Senate after the 1936 election.) From that point on, the typical patterns took over—but the erosion in congressional numbers in the president's party came from such a huge base that the effect was limited. Democrats lost seventy seats in Roosevelt's "six-year itch" election of 1938, and lost another fifty seats in his last midterm election, 1942—but they still managed to retain a majority!

When it all finally caught up with the Democratic Party in 1946, after a full fourteen years in the White House, their loss of the House was narrow enough that they were able to regain control on the heels of Harry Truman's comeback victory in 1948. When Eisenhower won the presidency in 1952, he, unlike Roosevelt, had no party majority already in place from the preceding midterm election, and his coattails were too short to build any significant cushion against the coming midterm loss. Republicans lost the Congress in 1954, fell back by a huge margin in the six-year itch of 1958, and have been in a hole ever since. Every time they start to emerge from that hole, the counter-cycle of presidential politics deepens it a little more.

Without the large advantages of incumbents, and without modern redistricting, the outcomes of the last two decades in party control of Congress might still have been different. But they most certainly would have been different, and more advantageous to the Republicans, if the Democrats had won the presidency more often. (For obvious reasons, however, the Republican Party is unwilling to consider deliberately losing the White House in order to achieve the elusive goal of capturing the House of Representatives.)

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Future prospects

Does this then mean that the Republicans will not capture the Congress until the Democrats achieve a two-term presidency? Not necessarily. The GOP's commitment to the arduous and difficult tasks of building a candidate base, investing in districts where victory might be years away, and capturing a new philosophical excitement may pay off in the near future.

There are other favorable signs for the Republicans. The reapportionment and redistricting of the early 1990s are unlikely to result in a large partisan edge for either party, but by redrawing district lines for nearly all incumbents in the House, they may create new opportunities for turnover. For many reasons, including generational change, the trauma of new district lines, and changes in campaign rules, we are also likely to see more retirements from the House in 1992, leading to more open seats. If Congress enacts effective campaign-finance reform before then, a system that creates opportunities for challengers may enable more of them actively to contest seats. If the underlying, rumbling discontent in the electorate about Washington-politics-as-usual gets ignited by a catalytic event, such as the savings-and-loan scandal, the patterns of the past few decades may be broken, and large numbers of incumbents of both parties may find themselves unemployed.

These are all shaky, conditional statements, but they do indicate that the House may change significantly before the turn of the century. Would such a change be desirable? Beyond the obvious partisan considerations, many reformers, including such Democrats as James Sundquist and Lloyd Cutler, believe that the pattern of divided government is harmful, even pernicious. In terms of policy, however, political scientist David Mayhew has found no evidence of any real difference, in quantity or quality of outputs, between periods of unified and of divided government in America.

As for the American public, surveys for decades have consistently indicated that two-thirds of voters prefer having a president of one party and a Congress of the other. They are not losing sleep over our partisan institutional arrangements.

Nevertheless, the experience of the Senate, which the Republicans controlled from 1981 through 1986, shows that a change in party control can be healthy for both majority and minority—giving each side the perspective of the other, including the responsibility required to be in the majority and the frustration inherent in

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

being in the minority. The Senate today, run by Democrats, operates better, in my judgment, than it would if the GOP had not won a majority a decade ago with Ronald Reagan's landslide. The House could benefit from the same change in perspective.

At the same time, the lengthy period of divided majorities, unprecedented in American history, has created damaging turmoil in the psyches of both parties. Schizophrenic government has led to schizophrenic parties. Democrats and Republicans are at the same time swaggering and uncertain, secure and paranoid. Each side is confident in its own hegemonic domain, but thrown off stride by its abject failure to extend its popularity and control to the other's turf.

Each party is fearful that it will make a mistake and lose its own empire—not just for one term, but for decades. And each side is hopeful that it can finally capture its rightful, complete majority, by forcing the other to make the fatal mistake. The result is passive-aggressive politics, the politics of avoiding blame. Each side is so concerned about avoiding a mistake, and so intent on tarring the opposition, that taking risks to make better policy is increasingly uncommon.

Conventional wisdom holds that the safer lawmakers are, the more willing and able they are to take risks and to cast unpopular votes. The reality, in the contemporary period, is the opposite. The safer are the seats in the House, the more skittish are the members. Changes that would bring more competition to House elections would help to break this pattern, even if they did not automatically result in a different majority party. Most desirable would be campaign-finance reform that would open up new sources of money to candidates and make it easier to run competitive campaigns, starting with generous tax credits and matching funds for individual in-state contributions, and some "seed money" mechanism to pay for start-up costs for fledgling challengers.

Campaign-finance reform of this sort is desirable, as is more real competitiveness in House elections. But there is no case to be made for significant constitutional reform. Like it or not, today's Congress legitimately reflects the electorate's wishes; it is not an artificial and illegitimate construct of a sneaky Democratic Party playing by its own set of rules. To win the House and break the pattern, Republicans need to change their outlook and their campaign approaches—not to alter the fundamental constitutional rules that we have used for two centuries.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Republicans tried the latter strategy once before; frustrated by Democratic dominance of the presidency under Roosevelt, the GOP pushed through the 22nd Amendment to the Constitution, limiting presidents to two terms. Ronald Reagan, among others, has forcefully underscored the self-defeating folly of that approach, arguing against its weakening of the presidency. It would be far better to mobilize to repeal the 22nd Amendment than to repeat the mistake by limiting tenure in Congress now that political currents have changed.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Congressional despots, then and now

FRED BARNES

SENATOR Trent Lott (R-Miss.) was working at his Capitol Hill office one March day in 1990 when an aide rushed in. "Bob Byrd's here," the aide said. Lott was puzzled. "You mean Senator Bob Byrd?" he asked. Yes, the aide said. Robert Byrd (D-West Va.)—a senator since 1959, the Senate majority leader until 1989, and now chairman of the Senate Appropriations Committee—was standing in Lott's outer office. He wasn't in the habit of casually dropping by to chat with other senators, particularly freshmen like Lott. And Byrd hadn't come for small talk this time either. He gave Lott a hand-written note, asking for his vote on an amendment to the Clean Air Act reauthorization. Byrd was deadly serious about the amendment, which would have provided lucrative benefits to coal miners who lost their jobs because of new environmental restrictions on high-sulfur coal, the kind mined in West Virginia. The average displaced coal miner would have drawn $41,000 the first year. If Lott voted with him, Byrd made it clear, he'd look favorably on Lott's requests for pork

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

barrel for Mississippi. If Lott didn't—well, the implication was clear.

Byrd is in a unique position to reward friends and punish foes. As Appropriations chairman, he can put funds for special projects—roads, bridges, education grants, federal buildings, etc.—in spending bills, or he can delete them. So he's not a senator whose appeals for votes are taken lightly. On the miners' amendment, Byrd was strongly opposed by Senate Majority Leader George Mitchell and the Bush administration. Normally this would be sufficient to crush a single senator's pet cause. But as it turned out, only sixteen of fifty-five Democratic senators sided with Mitchell over Byrd. Ten of forty-five Republicans (Lott wasn't one of them) spurned the White House and voted with Byrd. Only a veto threat by President Bush prevented Byrd from winning. Three senators who'd promised him their support wound up opposing him. The vote was 50-49.

The Byrd episode reflects the status of congressional despots now: they're still around, but they don't have their former clout. Few members of Congress are terrified of them anymore. Look at poor Dan Rostenkowski (D-Ill.), the chairman of the House Ways and Means Committee, arguably the most powerful committee in Congress. He operates the old way, just like Byrd, assisting friends and penalizing enemies. Rostenkowski was furious at Representative Kent Hance (D-Tex.) for jumping ship in 1981 and cosponsoring President Reagan's sweeping tax cut. When Hance showed up at his first Ways and Means session after crossing Rostenkowski (and the Democratic leadership), he found the casters off his chair. Rostenkowski denied any knowledge of this. Later, Hance went to Andrews Air Force Base outside Washington to fly off on a junket with other Ways and Means members, only to have Rostenkowski bar him.

Disciplining the renegade did not have the desired effect. If the old rules of power still held, Rostenkowski would have solidified his position as a powerful autocrat by 1989. He hasn't. True, Ways and Means Democrats and a few Republicans constitute a "Rosty" bloc. But that didn't spare Rostenkowski three embarrassing defeats in 1989. Congress overwhelmingly terminated the catastrophic-illness insurance program that Ways and Means had hatched the year before. Worse, one of Rostenkowski's favorite provisions of the 1986 tax-reform bill was repealed. This was section 89, which forced employers to equalize fringe benefits such as health-care

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and tax-deferral plans for high- and low-paid workers. Worse still, six Democrats on Ways and Means bucked Rostenkowski, joined Republicans, and approved a cut in the capital-gains tax rate in the committee. The bill, with Rostenkowski still in opposition, later passed the House, then died in the Senate.

The last true despot in Congress was House Speaker Jim Wright, who resigned in 1989 after being accused of violating House ethics rules. He routinely cut corners on House procedures to have his way. He made Representative Jim Chapman (D-Tex.) the head of the Democratic class elected in 1986, though Chapman had actually won a special election eighteen months earlier. Wright liked predetermined outcomes. He hated to be crossed, and he frequently threatened to punch anyone who challenged him. Republicans claimed that he often counted the ayes and nays inaccurately—on purpose. As a result, they insisted on more roll-call votes. When Wright was majority leader (1977-1987), Dan Lungren (R-Calif.) and Robert Walker (R-Pa.) protested that he had miscounted the House and wrongly concluded that a quorum was present. Wright became enraged. He stopped presiding and strutted down to the House floor to confront Lungren and Walker. "Are you questioning my integrity?" he demanded. Before they came to blows, Tip O'Neill, then House speaker, intervened and ushered Wright away.

Despotism's decline

The decline of despotism in Congress began with the leap of Fanne Foxe, a stripper and paramour of Representative Wilbur Mills (D-Ark.), into the Tidal Basin in 1974. As Ways and Means chairman, Mills was enormously influential, the near-sovereign of a powerful fiefdom. He had the power of secrecy, since his committee always acted in closed-door session. More important, Ways and Means had authority over more than taxes and trade; it also decided who got on which committee. But once the Tidal Basin fiasco was reported in the press, both Mills and Ways and Means were on the slippery slope. Mills became a laughingstock. And the committee was soon stripped of its committee-assignment function, which was given to the Democratic Steering and Policy Committee, largely controlled by the speaker.

Since 1910, committee chairmen, particularly in the House, had ruled Congress. Before that, Speaker Joe Cannon, a Republican, had dictatorial control of the House. Cannon twitted his crit-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ics by bellowing, "Behold Mr. Cannon, the Beelzebub of Congress! Gaze on this noble form! Me, the Beelzebub! Me! The Czar!" He got his comeuppance. Cannon was stripped of his right to appoint all committee members and to sit on the Rules Committee himself. In the place of an all-powerful speaker, the seniority system was installed. The speaker became a power broker, pressuring and appeasing committee chairmen to get his way. Sometimes the speaker succeeded, sometimes not.

Sam Rayburn, speaker from 1940 to 1961 (except during four years when Republicans controlled the House), worked out personal arrangements with all chairmen save one, Howard Smith (D-Va.) of Rules. Smith, on his own, was able to bottle up civil-rights and social legislation for years—until Rayburn packed the committee with new members in 1961. Rayburn regularly brought key chairmen together in his office at "Board of Education" meetings for private persuasion.

But Rayburn's timid successors, John McCormack and Carl Albert, were not as skillful at holding committee chairmen in check. Chairmen began to run amok, and Mills was hardly the worst offender. Wayne Hays, the chairman of the House Administration Committee, outdid him. Hays controlled the perks, paychecks, and provisions for everyone in the House. If another House member angered him, Hays cut off his office supplies or air conditioning. He was a petty tyrant. In one incident, he became incensed when an elevator operator remained seated when he entered. "Don't you know who I am?" Hays said. "Which floor?" the operator responded. Hays ordered all seats taken out of the elevators. Once he grew irritated when a young man walked into an elevator too slowly. Hays chewed him out and promised to have him fired from his House job. Hays also took it upon himself to dispense parking privileges, though that job belonged to a committee of three House members. Tony Coelho, then an aide to Representative B.F. Sisk (D-Calif.) and in 1987 the first elected House Whip, instructed Capitol Police to ignore the permits issued by Hays, who was furious. In retaliation, Hays held up Coelho's paychecks for weeks. He could do this because his signature was required on House checks. Oddly enough, Hays survived when House members revolted against autocratic chairmen in 1975—but not for long. He was defeated for reelection in 1976, after it was discovered that he'd hired his mistress, Elizabeth Ray, as a committee secretary. She couldn't type.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The "Watergate class," House Democrats elected in 1974, spearheaded the last wave of reform. Chris Matthews, an aide to Tip O'Neill for six years, described the new members as "young, brash, and independent of" congressional elders and "their system." They were determined to do much more than strip Ways and Means of its committee-assignment power. They sacked the seniority system by joining with a bloc of older members in the Democratic caucus to oust three despotic committee chairmen—Edward Hebert (D-La.) of Armed Services, Wright Patman (D-Tex.) of Banking, and W.R. Poage (D-Tex.) of Agriculture. Hebert was a particular target because he had, among other things, offended a young member elected in 1972, Patricia Schroeder (D-Colo.), with sexist remarks.

Transforming chairmanships into elective posts was a revolutionary step. It made every chairman less autocratic, more willing to follow the wishes of committee members. With the creation of more subcommittees, moreover, power flowed away from chairmen. In 1955, there were sixty-three standing committees and subcommittees; by 1975, there were 142. (Since then, the number has dropped to 128.) Many subcommittee chairmen have proved to be highly independent, even clashing openly with committee chairmen. The thirteen chairmen of appropriations subcommittees have been especially independent-minded; under a 1975 reform, they're elected by the full Democratic caucus. The overall impact of the changes was to fragment power in the House and reduce the prospects of new autocrats. "No contemporary committee leader can realistically hope to exert despotic power, although some, such as Energy and Commerce's Congressman John Dingell (D-Mich.), clearly covet the opportunity," wrote political scientist Burdett Loomis in *The New American Politician*.

The Wright stuff

Despite the diffusion of power, one leader—the speaker—gained significantly more than anyone else. He was authorized to appoint a chunk of members to Steering and Policy, which gave him effective control of it. He appointed all members of Rules, which meant total dominance of that committee and of legislative procedures on the House floor. The speaker also gained the right to set deadlines for committees to report out legislation. This made it harder still for chairmen to thwart the speaker or the caucus. Albert failed to exploit the new authority, and O'Neill used it lightly.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Tom Foley, elected speaker in 1989, has emulated Albert. Jim Wright was a different story.

"In essence, Wright wanted to govern the country from the House," wrote John M. Barry in *The Ambition and the Power*. "He intended to succeed by transforming the House into a disciplined weapon, a phalanx which he could hurl at his enemies." According to Barry, shortly before becoming speaker Wright was influenced by a remark of Representative Morris Udall (D-Ariz.), who told him: "John McCormack was majority leader or speaker for 25 years and there isn't a single policy, a single bill, a single set of actions, identified with him. I hope you won't make that mistake." Wright didn't. He identified himself with stopping aid to the Nicaraguan contras, raising taxes, and spending more on infrastructure and social programs.

But he made other mistakes. "He tried to be an autocrat," says former Representative Richard Bolling (D-Mo.), now an adviser to Majority Leader Richard Gephardt. "You can't be an autocrat in this institution. You've got a democratic process that will do you in." Wright made promises that he couldn't keep. In January 1989, he assured House members that he'd bar a vote on a $50,000 pay raise and let the hike go into effect automatically. But when criticism mounted, Wright backed down and allowed a vote. The pay raise was voted down, angering many House members who wanted the money but not the blame incurred by voting for it. In March 1988, Wright told House GOP Leader Robert Michel that Republicans would get a separate, up-or-down vote on their bill for funding the *contras*. Wright reneged, prompting a scathing press release by the mild-mannered Michel. "Seldom in my tenure in Congress has the Democratic majority exercised such abuse of the legislative process as they have in the procedures which have been forced upon us for considering the contra-aid proposal," Michel said. "In over 30 years as a member of this institution, I have kept my word. I expect others to do the same." Michel, by the way, had gotten along famously with O'Neill; the pair often played the piano and sang together. In contrast, Michel and Wright never socialized.

Wright's most egregious instance of overreaching occurred on October 29, 1987. He wanted desperately to win approval of a budget-reconciliation bill with controversial tax-increase and welfare provisions. Wright had assured Representative Charles Stenholm (D-Tex.) that the welfare part would be removed, but it wasn't. So Stenholm, thirty-four other Democrats, and every

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

House Republican voted against the rule for handling the bill on the floor. The 217-203 vote meant that the bill couldn't be brought up for a vote, and Wright was fit to be tied. But he didn't give up. His strategy was to adjourn, then to reconvene ten minutes later after declaring the fiction of a new legislative day. That done, a rule was passed putting the bill on the floor without the welfare provision. Wright figured that he had the vote won. But after the normal fifteen minutes allotted for voting were up, opponents—mainly Republicans—were ahead 206-205. They thought that they'd whipped Wright on a major piece of legislation. With Republicans demanding that he declare the vote final, Wright announced that "there are members on the way who desire to vote. The chair will accommodate their wishes." Actually, there were none. Instead, Wright aides were frantically cajoling Jim Chapman to change his "no" vote to "yes." Democrats on the floor tried to delay by asking how their votes had been recorded (they could have looked at the electronic scoreboard if they were really in doubt), but the parliamentarian barred this. Finally Wright said, "If there are no other members who desire to vote or change their vote, all time has expired." Republicans cheered jubilantly, but just then Wright aide John Mack rushed down the aisle with Chapman in tow. Chapman changed his vote, and Wright, over repeated Republican objections, said, "The bill has passed." Republicans were apoplectic. Several rushed to the well to yell at Wright. Lott, then House GOP Whip, pounded his fist so hard on a wooden lectern that it splintered. Wright had abandoned any chance of normal civilities with Republicans. This irrevocable break contributed heavily to Wright's fall. If Wright hadn't antagonized Republicans by acting despotically, they would never have hounded him so relentlessly on ethics charges.

John Dingell and despotic remnants

With Wright gone, the closest thing to a congressional tyrant today is John Dingell (D-Mich.), the chairman of the House Energy and Commerce Committee. In 1982 he was taken aback when Representative Dale Kildee (D-Mich.) voted against a pay raise that Dingell fervently supported. He shouted to Kildee across the House floor: "Kildee, I hope you're happy with your current committee assignments." Kildee had been seeking Michigan's seat on Ways and Means. He didn't get it in 1982, and still hasn't. As boss of the Michigan delegation, Dingell saw to that.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Dingell, an intimidating presence at 6-foot-3, 215 pounds, has built Energy and Commerce into the scourge of the executive branch. Under his chairmanship since 1981, the committee's jurisdiction has been elastic, its style hyper-aggressive and bullying. "His staff of more than 140 carpet-bombs executive departments with 'Dingellgrams,' letters often of 20 pages or more with hundreds of questions," wrote Paul Gigot of the *Wall Street Journal*. "They can paralyze an agency for days." Sometimes these are serious efforts at oversight. But frequently they are fishing expeditions. Dingell will investigate practically anything—drug companies, the Environmental Protection Agency, "scientific fraud," Drexel Burnham Lambert, Michael Deaver (found guilty of perjuring himself in his appearance before Dingell), nuclear power, pesticides, etc. He's touched off feuds with Rostenkowski and Les Aspin, the chairman of the House Armed Services Committee, by encroaching on their turf. His rationale for probing Defense Department contracting was that his oversight of the Securities and Exchange Commission included the right to look into any company that does business with the Pentagon.

Hearings conducted by Dingell, who chairs the oversight subcommittee of Energy and Commerce as well as the full committee, are highly adversarial and inquisition-like. The Iran-*contra* hearings were chummy in comparison. In 1989, Dingell ambushed a witness, private investigator John Gibbons, by playing a secretly recorded tape of a conversation between Gibbons and another man. Unbeknownst to Gibbons, the tape had been recorded in California—despite a state law that bars taping of conversations unless all participants agree. Dingell declined to apologize, except to say that the taping fell short of his "higher standards" for investigative procedures. In another case, an MIT biology professor was pilloried at two hearings that he'd never been notified of. When he wrote Dingell, the chairman didn't respond.

Dingell's power is not unlimited. He led a revolt in the 1970s against then-chairman Harley Staggers (D-West Va.) that established Energy and Commerce subcommittees as independent fiefdoms. Now Dingell in turn must accommodate assertive subcommittee chairmen like Henry Waxman (D-Calif.). While O'Neill was speaker, new members added to the committee kept Dingell from having a reliable majority. This didn't always stop Dingell from having his way, though. In 1983, twenty-three members favored decontrol of "old" natural gas, and nineteen opposed it. As

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Congress neared adjournment, the committee was expected to report out a decontrol bill. "John," an advocate of decontrol whispered to Dingell at the start of the final committee session, "we've got the votes." Dingell shot back, "Yeah, but I've got the gavel." The gavel prevailed; after two preliminary votes went against him, Dingell abruptly adjourned the meeting and departed, killing decontrol.

For eleven years (1979 to 1990), Dingell singlehandedly blocked revision or reauthorization of the Clean Air Act, acting to protect the biggest special interest in his home town (Detroit), the auto industry. At the same time, he was unable to ease environmental standards on new cars, which Waxman had the votes to block. But Dingell recognized that things had changed by 1990. President Reagan had never sent clean-air legislation to Congress, but Bush drafted comprehensive revisions of the Clean Air Act in 1989. Blocking it would have put Dingell at odds not only with Bush, but also with most congressional Democrats and public opinion. He relented, cosponsoring Bush's bill and negotiating a compromise with his nemesis, Waxman, that cleared the House floor in one day.

Other committee chairmen

Like Dingell, Rostenkowski follows the rule that you can't be powerful if you try to be liked by everyone. He has enemies. One was Carl Albert, who thought that Rostenkowski had embarrassed him at the 1968 Democratic National Convention in Chicago by stepping in to gavel the crowd into submission when Albert couldn't. When Albert became speaker in 1971, he blocked Rostenkowski from becoming whip, choosing O'Neill instead. O'Neill and Rostenkowski were friends, and in 1981 O'Neill, then speaker, offered Rostenkowski a second chance to become whip. He preferred to take over Ways and Means, and Thomas Foley (D-Wash.) became whip. Now Foley is speaker, and Rostenkowski isn't likely to get another shot at the leadership ladder.

At Ways and Means, subcommittee chairmen aren't a problem for Rostenkowski. He controls the subcommittee staff, and he is the sole spokesman for the committee. If a member goes on a TV interview show to discuss Ways and Means business, he incurs Rostenkowski's enduring wrath; few chance it. Rostenkowski also has an important ally outside Ways and Means, Bush. Because of this, White House aides advise House Republicans to go easy on Rostenkowski on the ground that he may come to Bush's aid later.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Bush and Rostenkowski were close to negotiating a deal on child care in 1990 before Foley intervened and called Rostenkowski off. A conspiracy theory popular among anti-Rostenkowski Democrats is that he was the covert mastermind of the capital-gains tax cut that cleared Ways and Means in 1989. There's no evidence for this, except his friendship with Bush, who wanted the cut.

As Ways and Means chairman, Rostenkowski has a special power beyond shaping tax and trade bills. Along with the chairman of the Senate Finance Committee, he is permitted by long custom to tack special tax breaks, known as "transition rules," onto every tax bill. Naturally he makes sure that there's enough money for them; every tax bill raises several billion dollars extra to cover the special breaks. Rostenkowski dangles them as favors for friends and allies, never for foes. To make sure that Claude Pepper (D-Fla.), then chairman of Rules, reported out the 1986 tax-reform bill with a rule allowing few floor amendments, Rostenkowski loaded the measure with tax goodies for him. These included exceptions to tax-exempt-bond limits for a new stadium for the Miami Dolphins football team, a convention center in Miami Beach, and a mid-town Miami redevelopment project, according to Jeffrey Birnbaum and Alan Murray, who chronicled tax reform in *Showdown at Gucci Gulch*. Pepper gave Rostenkowski exactly what he wanted.

Jamie Whitten (D-Miss.), chairman of Appropriations since 1979, faces limits on his power similar to those that Dingell and Rostenkowski confront. Appropriations has thirteen subcommittees whose chairmen, known as "the cardinals," are elected by the caucus, not anointed by Whitten. And the committee operates in an era when expenditures are limited by the deficit and the growing share of the federal budget taken up by nondiscretionary and military spending. Controllable domestic spending fell from 24 percent of the budget in 1981 to 16 percent in 1989. "The Appropriations Committee has been reduced to a bunch of accountants with green eye shades," David Obey (D-Wis.), the chairman of the foreign-operations subcommittee, told Dan Morgan of the *Washington Post*. As Obey's statement suggests, cutting spending isn't as much fun—and isn't the source of as much political clout—as spending is. (At Ways and Means, Rostenkowski has found that raising taxes isn't as pleasant and aggrandizing an exercise as cutting taxes.)

Still, Whitten has his own tools of power. Given roughly a half-billion dollars to spend, Whitten decides how to parcel it out among the subcommittees. This makes the subcommittee chairmen reluc-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tant to buck him. Another tool is his practice of mumbling. Few members of Congress can understand what Whitten is saying, and they don't want to embarrass him or themselves by asking. Even the President won't ask. Whitten came to a meeting at the White House in the spring of 1990 and, as best anyone could tell, railed against excessive debt. Bush looked puzzled, but he didn't request a translation. No one pressures Whitten. In the mid-1980s, then-Budget Director David Stockman met with Whitten in hopes of reaching a spending agreement. Whitten noisily rattled pencils on his desk as Stockman talked. Then he denounced the deficit and personal debt, and the meeting was over, nothing having been accomplished.

As much as anyone in Washington, Whitten is responsible for excessive federal spending. He's reached a tacit agreement with others in Congress: so long as he gets all the projects he wants for Mississippi, they can get much of what they want too. "Liberals never minded giving money to [a poor state like] Mississippi," explains Bolling. One result is that Mississippi is allocated more federal money per capita than any state. Whitten has one special trick. Every year, he underfunds the food-stamp program and employment-security offices. As a result, a supplemental appropriation is required annually, and it becomes a vehicle for more pork-barrel projects.

The cardinals have tricks of their own. Neal Smith (D-Iowa), the chairman of the subcommittee on commerce, balked at counting new funds to fight the drug war as part of his subcommittee's share of the budget in 1989. He refused to cut anything to offset the new antidrug spending, though he was required to do so. In the end, he prevailed; the drug-war funds weren't counted against him. The fully discretionary money controlled by subcommittee chairmen is "little pork," which funds small projects. But since these are coveted, it's risky to be at odds with the chairmen. Clay Shaw (R-Fla.) voted in 1989 to increase Coast Guard funding against the wishes of William Lehman (D-Fla.), the chairman of the transportation subcommittee. Lehman retaliated by scratching $1 million sought by Shaw for a tunnel in Fort Lauderdale. Lehman also punished Democrats who didn't stick with him in a fight with the Public Works Committee in 1989. Lee Hamilton (D-Ind.) lost an instrument-landing system for an airport in his district.

In fairness, these examples are growing less typical. Now that the House increasingly emulates the Senate, it is becoming less

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

despotic. Since 1975, House members have adopted the free-lance style of senators. They've become individual political entrepreneurs, elected on their own and beholden to no one in Congress. They don't have to go along to get along; they can strike out on their own from the moment they arrive, pushing issues and seeking publicity. This causes legislative chaos, but at least despots can't emerge and thrive. In the Senate, contrary to popular belief, there's no club, no inner sanctum of despots who run the place.

Still, some senators get away with mini-despotism. In the spring of 1990, Byrd forced two tedious roll-call votes so that he could set the record for most votes cast in the Senate. He lost his bid to aid displaced West Virginia coal miners, but he struck again with a supplemental appropriation for a new project, $185 million for a new FBI fingerprint lab, probably in Clarksburg, West Virginia. A year earlier, he'd leaned on FBI Director William Sessions to study the feasibility of building the lab. Now he was back for the money. There was grumbling about the project in the Senate and the House, but it survived a gauntlet of negotiations, conferences, and votes. Byrd argued that child molesters might be hired at day-care centers and that cop killers would go free without the lab. Billions of dollars would be saved, he claimed. Few bought his argument, but nobody stepped forward to block his project. Byrd got the full $185 million.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Public opinion and the "Congress problem"

EVERETT CARLL LADD

THE CURRENT DEBATE over whether America's federal government needs institutional reform focuses on the Congress. It, and not the presidency or the federal courts, is the branch seen by a large and growing corps of critics to be working poorly.

At the heart of the problem are the advantages that incumbents have over their opponents in contests for the House of Representatives. Over the last quarter-century, these advantages have become so great that popular control has been lost in practice, though it remains guaranteed in law.[1] The electoral sanction is central to democratic governance. When present and functioning satisfactorily, it enables the public to control its officials by removing them from office—whenever their performance is deemed inadequate, to be sure, and sometimes just to shake things up. This electoral

[1]For reasons discussed below, extreme incumbency advantages apply in the House but not in the Senate. Since, in my view and that of some other observers, these advantages are the source of the current institutional failure, it is more accurate to say that the U.S. has a "House problem" than a "Congress problem."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

sanction is alive and well in contests for a great many offices in the U.S.—including president, senators, governors, and mayors. But in the case of congressmen, a conspiracy of circumstances has, *de facto*, robbed the electorate of a meaningful say in who does and does not belong in office.

The incumbent congressional establishment has powerful incentives for maintaining the status quo. As a result, action to end prohibitive incumbency advantages, and thus to restore the virtues of real competition to the House, is unlikely unless and until substantial segments of the public signal that they want action. Where does the public stand?

As we will see from the survey data below, Americans are clearly unhappy with congressional performance. But at present they can't put their fingers on the source of their unease, and so they are not prepared to act coherently. What's more, the public is not at all unhappy with one prime by-product of House incumbents' ascendancy—the divided institutional control that, for the first time in U.S. history, has become the norm, as Republicans win the presidency regularly and compete fairly evenly in Senate contests but are unable to break the Democrats' incumbency-sustained lock on the House. The problem of entrenched incumbency can't be addressed successfully by appeals to let one party have a chance to govern at both ends of Pennsylvania Avenue.

The incumbency problem

American voters now routinely reelect House incumbents from both political parties, returning them by overwhelming margins. They do so even though they are dissatisfied with Congress's performance as an institution—in part because their House vote decisions are largely divorced from substantive judgments about parties and policies. While I won't discuss it here, much the same thing seems to be happening in state legislatures, for the same basic reasons.

It was more than a decade and a half ago that political scientist David Mayhew called attention to the "vanishing marginals"—House seats where the winner's margin is small enough that the contest can be seen as competitive.[2] In 1960, when most observers thought both parties had too many safe seats, 203 of the 435 con-

[2]David R. Mayhew, "Congressional Elections: The Case of the Vanishing Marginals," *Polity*, vol. 6 (Spring 1974), pp. 295-317.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tests (47 percent) were at least marginally competitive, with the winner held to less than 60 percent of the vote. Two decades later, the low competitiveness of 1960 seemed robust. In 1980 the winner had less than 60 percent of the vote in only 140 House elections (32 percent). And by 1988 the number had plunged further to 65 elections, 15 percent of the total.

Over 98 percent of House incumbents seeking reelection in 1988 won, and most of them won by margins that can't be explained by the mix of party loyalties and policy preferences in their districts. The 1988 House elections were the least competitive in U.S. history. The winner either was unopposed or beat his opponent by at least forty percentage points in 242 of the 435 districts; the margin was twenty to forty points in 128 districts, and ten to twenty points in another 36. In only 29 districts—7 percent of the total—did the loser come within what might properly be considered striking distance, trailing by ten points or less. Open seats, where no incumbent is running, are often quite competitive, but in 1988 there were just twenty-six of them. Only six incumbents seeking reelection lost, and five of them had been tinged by personal scandal.

This virtual disappearance of competitiveness in House elections results from a mix of factors. Incumbents typically have many more resources than their rivals for promoting their candidacies. Over the course of the 1960s and 1970s, Congress tripled the staff provided to House members, and members have put many of their new assistants to work back home in their districts. Staff expansion was justified on the grounds that it would make Congress better able to do battle with the expert-laden executive branch, and that individual members would be better equipped for their legislative business. The former argument is certainly true, though whether the effect is salutary is debatable. The latter may not be true at all. But in any case, the augmented staffs are a potent year-round electoral resource—serving constituents and in general keeping members' names before district voters in a way that virtually no challengers can rival.

Incumbents also enjoy big leads in campaign contributions. Knowing that current officeholders are likely to be reelected and will have to be dealt with in future legislative struggles, the formidable array of organized interests that now envelops the national government backs them heavily through its political action committees (PACs). The $94 million that PACs contributed to House

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

campaigns in 1987-1988, in contests in which an incumbent was running for reelection, went to incumbents over challengers by slightly more than eight to one. Preliminary data on spending in the 1989-1990 election cycle suggest that the share of interest-group contributions received by incumbents continues to be very high. A *Washington Post* analysis of contributions data submitted to the Federal Elections Commission found that in 1989 PACs contributed $57 million to congressional candidates; more than 90 percent of this sum went to incumbents. "Not surprisingly," the *Post* noted, "much of the money went to members of committees with jurisdiction over the PACs' industries and unions." Even challengers in House races targeted by their parties for special effort usually have less financial support than the members whom they seek to unseat.

In races for governor and U.S. senator—as well, of course, as that for president—many voters know something substantial about the candidates' records. In these contests, even well-funded incumbents who are better known than their opponents may readily be defeated when the electorate wants policy changes. But House members simply don't have the visibility of governors and senators. Their stands and performances are largely unknown to most of the electorate. And voters are more likely to have a vaguely favorable image of the member than of his resource-poor challenger.

Political-party ties are the one thing that could upset this dynamic. That is, a voter might not know anything consequential about a member's record but still vote for a less well-known challenger, because the voter preferred the challenger's party. That is in fact exactly what happened historically. But over the last quarter-century, as incumbents have accumulated election resources far greater than before, the proportion of the electorate bound by strong party ties has declined precipitously. Better educated and drawing their political information largely from the media, American voters feel that they need parties less than did their counterparts of times past. In many ways they may be right in this inclination to dispense with parties and to focus on the candidates alone. But the inclination is misguided in the case of House candidates, since voters typically won't exert themselves to learn enough to form a coherent independent judgment.

In highly visible races such as those for president, senator, and governor, voters often do acquire enough information to make up

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

for the decline of the guidance that party ties long provided. At the other end of the spectrum, in elections for school-board members, aldermen, and other local officials, voters often have enough close-up, personal knowledge to reach reasonably informed judgments. House races and some other "intermediate" contests are where we now have our problem. Here, party voting is no longer decisive, but substantive knowledge of the candidates' records is insufficient to furnish a substitute base. Enjoying huge advantages in resources for self-promotion, incumbents can't readily be challenged so long as they avoid public scandal.

Public unease

Survey research provides no indication that any significant segment of the general public is very aware of, much less worried about, its loss of control over House members. But, to begin our review of the data, it is clear that many people are unhappy about Congress's overall performance, though not about the performance of their own representative. In fact, the proportion of Americans who are dissatisfied with Congress has grown dramatically over the past two decades.

A number of poll questions tap the present unease. Various survey organizations—including those of ABC News and the *Washington Post*, CBS News and the *New York Times*, as well as Gallup—now ask respondents whether they "approve or disapprove of the way Congress is doing its job." The "approve" and "disapprove" shares bounce around a good bit, depending in part on the overall national mood and the latest headlines. In 1986, when the public was especially optimistic, virtually all national institutions—Congress included—got higher marks than they had been receiving. In the spring of 1989, when the tribulations of House Speaker Jim Wright got headlines, the share of those who disapproved of Congress's performance grew. Despite this short-term movement, however, one can see a clear pattern from the early or mid-1970s on to the present. Throughout this span, disapproval has generally been high. Of the thirty-five national surveys I've located that asked the simple approve/disapprove question between January 1975 and March 1990, only five found more people positive about Congress than negative. The approval share averaged just 36 percent.

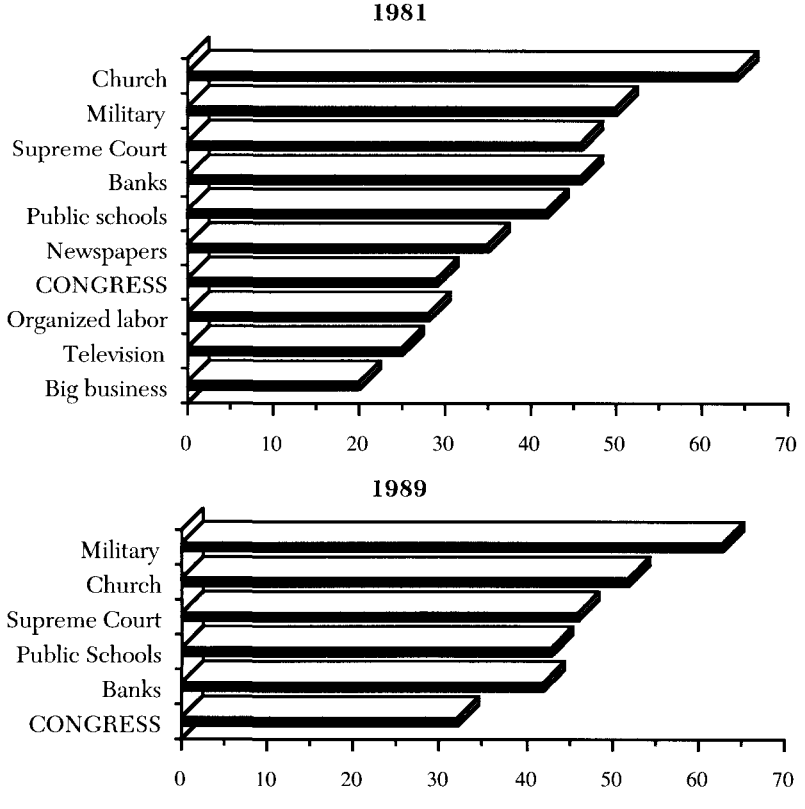
Even in our age of pop cynicism, 36-percent approval is low. Presidents' approval scores rise and fall too, of course, but with few exceptions over the past fifteen years they have been higher than

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Congress's. In early 1990 the gap between approval of President Bush and approval of Congress was over thirty percentage points. For the last fifteen years the gap has averaged about twenty points.

When Congress's standing is compared with that of a variety of other institutions besides the presidency, the same picture is evident. For example, Gallup asks its respondents whether they have "a great deal, quite a lot, some, or very little" confidence in the military, banks, the Supreme Court, and other institutions. Congress is consistently back in the pack. It always lags well behind churches, the military, public schools, and the Supreme Court. Its peers are such relatively low-rated institutions as organized labor, television, and big business. In September 1989, when 63 percent said that they had a great deal or quite a lot of confidence in the military, only 32 percent held Congress in such esteem.

Figure I. Percentage of Respondents with "a Great Deal" or "Quite a Lot" of Confidence in Given Institutions[a]

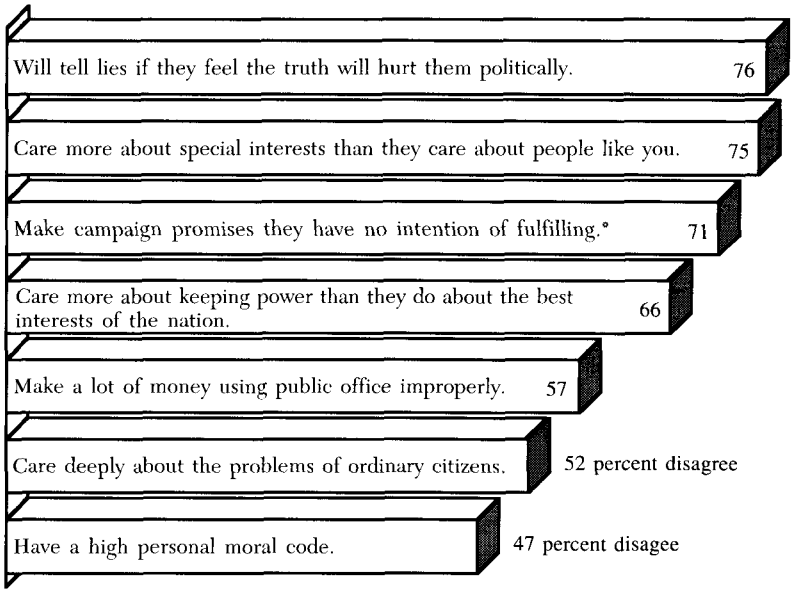


[a]Source: Surveys by the Gallup Organization.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

A battery of questions about Congress included in a May 1989 ABC News/*Washington Post* survey illustrates the general tone of public assessment of Congress in recent years—though the level of criticism is probably a little higher in this case than the norm, given the attention that the Jim Wright affair was then receiving. Seventy-one percent agreed that most congressional candidates will make promises that they have no intention of fulfilling in order to win elections, 76 percent agreed that most members will lie if they think it expedient, and 75 percent agreed that most members "care more about special interests than they care about people like you." Such testimony should not be read literally. The public often takes advantage of specific poll questions to convey a general message—here, that it's somehow dissatisfied with the performance of its national legislature.

Figure II. Percentage of Respondents Who Agree that "Most Members of Congress..."[a]


Will tell lies if they feel the truth will hurt them politically. 76
Care more about special interests than they care about people like you. 75
Make campaign promises they have no intention of fulfilling.* 71
Care more about keeping power than they do about the best interests of the nation. 66
Make a lot of money using public office improperly. 57
Care deeply about the problems of ordinary citizens. 52 percent disagree
Have a high personal moral code. 47 percent disagee

*This question began: "To win elections, most candidates for Congress...."

[a]Source: Survey by ABC News/*Washington Post*, May 19-23, 1989. Respondents were told: "I'm going to read a few statements. For each, can you please tell me if you tend to agree or disagree with it, or if, perhaps, you have no opinion about that statement?"

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Dissatisfaction wasn't nearly so high in the past. No single question has been repeated over the entire span covered by polling—the late 1930s to the present—but a great many questions similar to those of recent years were asked in the earlier periods. For example, a Gallup poll of August 20-25, 1958, asked whether Congress was doing a "good job" or a "poor job." It found only 12 percent saying poor. In September 1964, another Gallup study asked how much "trust and confidence you have" in Congress. "The top of the ladder in this case means the greatest possible confidence, the bottom no confidence at all." There were eleven rungs, numbered zero through ten. Only 2 percent placed themselves on one of the lowest three; 46 percent chose the highest three. The median was between rungs six and seven.

As late as 1970, Americans were still rating Congress quite positively. In June 1970 Gallup showed its respondents a card on which there were ten boxes, numbered from +5 (for institutions "you like very much") down to –5 (for those "you dislike very much"). Only 3 percent assigned Congress to the –4 or –5 boxes, while 36 percent put it either in +4 or +5. Only 10 percent gave Congress a negative score of any sort. It was during Watergate that Congress's standing took its big plunge. Despite some short-term movement over the past fifteen years, public confidence in the national legislature has remained low.

Unfocused dissatisfaction

But while unease with Congress is substantial, the criticism lacks focus. Some observers claim that the response to a CBS News/*New York Times* poll of March 30-April 2, 1990, indicates that the diffuse dissatisfaction is now taking shape in support of a constitutional amendment to limit congressional tenure. Sixty-one percent of the respondents favored a limit on the number of times a House member can be elected, with Republicans, Democrats, and independents all endorsing a limit by about the same margin. But earlier polls, conducted when Congress's standing was much higher than it is now, recorded high across-the-board support for limiting terms. Americans are wedded to separation of powers and limited government. As the following table suggests, support for term limits isn't a new response to the current unease with Congress; its roots run deep into the nation's historic commitments to limited government.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Table: The Enduring Appeal of Term Limitation

1952[a]

It has been suggested that no United States senator or representative should serve more than a total of twelve years in office. Do you think this is a good idea or a poor idea?

	Good (%)	Poor (%)
Everyone	63	24
Republicans	64	26
Democrats	62	23
Independents	65	23

1990[b]

Do you think there should be a limit to the number of times a member of the House of Representatives can be elected to a two-year term, or not?

	Favor (%)	Oppose (%)
Everyone	61	31
Republicans	64	28
Democrats	60	30
Independents	58	33

[a]Source: Survey by the Gallup Organization, March 27-April 1, 1952.

[b]Source: Survey by the *New York Times*/CBS News, March 30-April 2, 1990.

Despite being unhappy with Congress, Americans return House incumbents of both parties by huge majorities. Some observers explain this phenomenon by saying that voters like their own representatives, even though they don't like the institution's performance. It's true that polls asking people about their local members get a positive assessment every time, but this doesn't tell us anything new. After all, voters overwhelmingly reelect their representatives every time, so in some sense they must be positive about them. The important question is, in what sense?

Polls provide the answer: in contrast to what is often the case with regard to presidents, senators, and governors, the public knows next to nothing about individual congressmen. An ABC News/*Washington Post* poll of May 1989 is typical; it found that only 28 percent could *name* their congressman. People "like" their representatives only in the sense that they have heard something about them more often and for a longer span than they have heard about the challengers. And usually the public—save for the dwindling minority who vote along party lines and who back the party out of power in the district—has not absorbed anything negative about the incumbent. Members sail through elections virtually unchallenged because they are better known, and most voters don't see any connection between their general dissatisfaction with the institution and the dynamic of their congressional voting.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Cognitive Madisonianism

Part of the reason that voters' dissatisfaction is almost wholly unfocused—and hence thus far politically inconsequential—is in the nature of the issue: institutional performance lacks the concrete immediacy of matters like taxes. Unless government officials commit such obvious sins as taking bribes, the public is not readily engaged. But something more must be involved here. Otherwise, the tension between the public's general unease with Congress's performance and its persistently massive endorsement of House incumbents would have intruded more than it has into the public's consciousness.

The claim that the House has an "incumbency problem" appears to most voters as an argument that something is wrong with regularly electing Republicans to the presidency while returning an entrenched Democratic majority to the House. And most voters simply don't think that divided control is in fact a problem. They see it as a natural extension of the historic U.S. commitment to the separation of powers, and they rather like it. For example, in a survey taken in Connecticut from November 29 through December 6, 1988, the University of Connecticut's Institute for Social Inquiry asked: "The way the election came out, the Republicans control the White House but the Democrats control both Houses of Congress. Do you think this is good for the country, or would it be better if one party had both the presidency and the Congress?" Sixty-seven percent favored divided results. By 55 percent to 36 percent, those who had voted for George Bush on November 8 and who declared themselves very pleased with his victory endorsed as "good for the country" a Democratic congressional majority! A survey taken in January of this year for NBC News and the *Wall Street Journal* asked whether "it is better for the same political party to control both the Congress and the presidency, so they can work together more closely, or ... better to have different political parties controlling [them] to prevent either one from going too far...." Sixty-three percent backed divided control; only 24 percent favored having one party responsible for both branches.

I have seen a number of polls in which people are asked about the desirability of limiting governmental institutions—either by extending the branches' independent authority to check one another (e.g., by giving the president the line-item veto) or by dividing control of the branches between the parties. A majority of respondents invariably supports the proposed limitations in such

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

polls. Early public-opinion surveys got much the same response that we see today. For example, in a study that he did for *Fortune* in April 1944, Elmo Roper asked his respondents whether it would be a bad thing "if a president from one party is elected next time, and the majority in Congress belongs to the other party." Only 31 percent thought that it would be.

But a new wrinkle has been added to this old American endorsement of sharply limited government. I have often noted that contemporary public-opinion research in the United States shows a public highly ambivalent on many major questions of public policy. For example, Americans endorse high levels of governmental protections and services, but at the same time they consider government too big, too expensive, and too intrusive.[3] They want somewhat contradictory things from the modern state, and they understand that the two parties differ significantly over the proper scope of government. Is it surprising, then, that a kind of cognitive Madisonianism in modern guise has emerged? The public wants to set the two parties' views of government's role in creative tension, with a Republican executive pushing one way and a Democratic legislature pushing the other way.

In theory, of course, Americans could reject the advice of many scholars that unified party control is better than divided control, and turn a deaf ear to the Republicans' plea that they merit a House majority, yet still turn out individual incumbents regularly so as to restore "responsibility." But they haven't found their way to this fairly abstract and complex conclusion. And Democratic leaders have compelling reasons of partisan self-interest for trying to prevent them from ever doing so.

The public probably won't again be content with the operation of Congress until it finds a way to reassert the control that it has lost over the last three decades. But the case that the massive advantages that House incumbents now enjoy precludes the competition on which effective democracy depends has not been made in the court of public opinion. Americans think that Congress is a problem, but they don't know why, or where to turn for answers.

---

[3]See, for example, Everett Carll Ladd, "Politics in the '80s: An Electorate at Odds with Itself," *Public Opinion*, vol. 5 (December/January 1983), pp. 2-6; Ladd, "The Reagan Phenomenon and Public Attitudes Toward Government," in Lester M. Salamon and Michael S. Lund, eds., *The Reagan Presidency and the Governing of America* (Washington, D.C.: Urban Institute Press, 1984); and Ladd and Karlyn H. Keene, "Attitudes Toward Government: What the Public Says," *Government Executive*, January 1988, pp. 11-16.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The independent-counsel regime

TERRY EASTLAND

IT IS A venerable legal maxim that hard cases make bad laws. So it happened in Watergate: the hard, indeed the aberrant, case of Watergate made the bad law of the independent-counsel statute, first enacted as Title VI of the Ethics in Government Act of 1978 and twice reauthorized during the eighties. Scheduled by its own terms to expire in 1992, the statute, which applies only to certain high-ranking members of the executive branch, deserves to go gentle into that good night reserved for bad legislation.

Of course, whether that will happen is a much different question. The Framers of the Constitution viewed the legislative branch as the strongest of the three, and in *Federalist* 48, James Madison wrote (with only slight exaggeration) that the legislature "is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The independent-counsel statute represents an unprecedented extension of congressional power that has unjustifiably weakened the executive branch. So long as Congress is controlled by Democrats, and the presidency by Republicans, the safe betting is that the statute will be extended in something close

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to its current form—unless a determined president skillfully opposes it. If George Bush undertakes and succeeds at that task, not only will the executive branch recover its proper strength but our politics generally will also be free of the debilitating influence of the independent-counsel regime.

Watergate and the origins of the law

By constitutional design, the president is responsible for his own conduct in office and for that of his aides. Yet the president has a conflict of interest when he undertakes to discharge that responsibility by investigating criminal allegations against his own appointees, not to mention himself. This conflict, like those that arise when judges decide disputes involving judges' pay or when Congress exempts itself from laws that it makes, was not forbidden by the Constitution. Until the era of the independent counsel, our political system had lived with the conflict by balancing it in various ways, such as by giving Congress the power to impeach executive officers (through explicit constitutional provision) or by allowing Congress to hold oversight hearings. On certain occasions our system had lived with the conflict simply by trying to minimize it through the executive's appointment of outside or special prosecutors to handle specific cases. The Grant, Theodore Roosevelt, Coolidge, and Truman administrations resorted to special prosecutors.

This, of course, is what happened in Watergate, as Attorney General Elliot Richardson named Archibald Cox, a Harvard law professor and former Solicitor General, to handle the investigation. Richardson promised the Senate that Cox would be independent and truly free to pursue the investigation wherever it might lead. But when Nixon abruptly removed the special prosecutor in a dispute over access to White House tapes, something unprecedented happened. For the first time in American political history Congress considered calling for a *court*-appointed special prosecutor whom the President would have no ability to control. In the view of many in Congress, the only way to minimize the President's conflict of interest so as effectively to overcome it, and thus the only way to guarantee prosecutorial independence from the executive branch, was to divest the executive of his power to appoint and remove the Watergate special prosecutor.

Congress did not enact either H.R. 11401 or S. 2611, the two leading proposals calling for a court-appointed Watergate special prosecutor. President Nixon, who apparently wanted to abolish the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

special prosecutor's office, changed his mind when the invariably negative reaction to the Cox firing included persistent calls for his impeachment or resignation. Leon Jaworski was quickly appointed by the Justice Department to succeed Cox, and Jaworski labored without administration interference. Jaworski's effort combined with the congressional investigation to effect a result consistent with public opinion—Nixon's resignation.

Our political system thus could be said to have worked well enough in the exceptional case of Watergate. But the new culture that Watergate helped to create concluded that the system was deficient. As early as 1974—the year Nixon resigned—Congress began searching for a way of establishing a system of special prosecutors on a permanent basis. This search for law culminated in the 1978 passage of Title VI.

Supporters of the new approach made much of the need to overcome the president's conflict of interest. The "special prosecutor" law, as it was first called upon enactment, was billed as a "recusal" statute. For many politicians, this proved an appealing way to think of the law at a time when avoiding even the appearance of a conflict of interest had become a dominant value in our politics. Yet it is doubtful that the 1978 law would have been enacted without the influence of two other political forces.

One was distrust of the presidency as an institution. The conventional wisdom in liberal circles in the mid-seventies was that the presidency had been expanding its power since the time of the New Deal, and that while some of this power was doubtless needed in the modern world, it had been abused by Lyndon Johnson in conducting the war in Vietnam and then by Richard Nixon. Watergate was seen as the inevitable product of an increasingly "imperial" institution, not the result of one man's shortcomings. The worry about the "imperial presidency" was so pronounced in Congress that in 1974 Sen. Sam Ervin introduced legislation, almost surely unconstitutional, that would have made the Department of Justice an independent agency. That same year Sen. Alan Cranston, sponsoring special-prosecutor legislation, argued the need for "an independent guardian to keep the Executive Branch honest"—as though the executive branch were inherently and perpetually prone to dishonesty.

The other influential idea concerned the investigation and prosecution of criminal allegations involving top executive officers. Whereas such investigation and prosecution was previously under-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

stood to be important but hardly compulsory, something subject to the discretion of the executive branch, now it was reckoned as so important as to be an almost absolute good. It was an activity to be relentlessly pursued, virtually without regard to financial or other costs. *Fiat justitia, ruat coelum*: Let justice be done, though the heavens may fall.

As the search for law proceeded during the mid-seventies, congressmen attempted to bolster their case for a permanent special-prosecutor mechanism by contending, in committee hearings and bill reports, that throughout history administrations had often looked the other way, neglecting to investigate allegations of executive wrongdoing. Whatever the elusive truth of that proposition, the presumption behind it was that no executive wrongdoing should go unpunished.

Watergate had an impact upon the elite culture of the nation's capital, an impact that is still evident today. The scandal obsessed Washington for two years; never before had a "crime" story so displaced normal political life. The heroes of the story were fearless reporters, fearless prosecutors, fearless members of Congress, and fearless members of the executive branch willing to "leak" information about their "bad" colleagues. The fearless were celebrated in print and celluloid. Role models were established for aspiring reporters, prosecutors, congressmen, and even members of the executive branch. The prosecutorial style was "in," with the questions—"What did you know and when did you know it?"—becoming among the most important in our politics.

With the dynamics of the political culture working so powerfully against the executive branch during Watergate, Congress necessarily benefited, its image rising especially among a media now blatantly hostile to the presidency. Many years later, Richard Harwood, the *Washington Post* ombudsman, observed that in the early to middle seventies the media "drifted into a relentlessly adversarial and hostile posture toward the presidency," while "the image of Congress ... underwent a rehabilitation." Through "its role in opposing the war, in forcing the resignation of Richard Nixon and in other crusades and endeavors, [Congress] became in the minds of many journalists the White Knight of Washington, the last, best bulwark of democracy."

It was in this, the most anti-executive political culture in our history, that the most anti-presidential Congress since Reconstruction labored and brought forth the special-prosecutor law of Title VI.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The statute and its consequences

Title VI was passed with the support of President Carter and his attorney general, Griffin Bell, who has since recanted his position. Under the new law, the attorney general was required to conduct a "preliminary investigation" whenever he received "specific information" alleging that certain high-ranking administration officials—about 120 in all, including the president—had violated any federal criminal law other than by committing a petty offense. According to the legislative history, "specific information" meant all allegations of wrongdoing save generalized ones having no basis in fact. The law provided that the attorney general must take no more than 90 days (or 120 in case of an extension) to conduct a preliminary investigation, and it precluded his use of the compulsory tools normally at hand—grand juries, subpoenas, plea bargains. The law also provided a formal means by which members of Congress could attempt to initiate an investigation, with the burden resting on the attorney general to explain to Congress a decision *against* applying for a special prosecutor.

Under the law, the attorney general could close his inquiry if he found that the allegation was "so unsubstantiated that no further investigation or prosecution is warranted." If he found that "the matter warrants further investigation or prosecution," he was required to apply to a special division of the federal court of appeals in Washington, D.C., which was created for the purpose of naming special prosecutors. If the attorney general was unable to reach a conclusion within the time allotted for the preliminary investigation, he was required to apply for a special prosecutor to be appointed anyway. Title VI gave the special division of the court no discretion in the matter of appointment; when the attorney general requested a special prosecutor, it was compelled to name one.

As for the special prosecutor himself, he was given the "full power and independent authority" to exercise all investigative and prosecutorial functions of the attorney general. He was to wear the shoes of the attorney general in almost every respect, though he could stray from Justice Department policies. He was merely required to comply, "to the extent [he] deems appropriate," with the department's written policies regarding the enforcement of criminal law. The legislative history shows that the special prosecutor retained the discretion to decide when to follow Justice policy. No other federal prosecutor has ever had such freedom. The law pro-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tected the prosecutor's autonomy by making it almost impossible for the president to remove him. Finally, the law required the special prosecutor to file a final report with the special court once he concluded his inquiry. The prosecutor was obliged to describe his effort, including the disposition of all cases brought and his reasons for any decisions not to prosecute. The court was given authority to make such reports public—a course followed in virtually every case.

In these ways the framers of Title VI established a new institutional framework for exercising part of the criminal law-enforcement power, which had traditionally belonged entirely to the president. In these ways conflict of interest was to be overcome, independence ensured, and justice pursued.

Or so it was supposed. Soon enough the law had unintended consequences. In 1978 and 1980 the attorney general could not do what the law effectively required: he could not *disprove* allegations of cocaine use levelled against two of President Carter's highest-ranking aides, Hamilton Jordan and Tim Kraft. So special prosecutors were named. There were no indictments, but the investigations symbolized the unfairness that the system could generate. It was not Justice Department policy at that time to prosecute cocaine-use charges, and yet the defendants endured the usual stigma and hardships—including legal bills—of individuals under criminal investigation. One of the special prosecutors later observed that had he been a regular prosecutor, he would have exercised discretion and thrown the case out immediately.

Instead of judging Title VI by these negative results and letting the law expire on its five-year timetable in 1983, Congress reauthorized it for another five years. Thinking that it could mitigate the inequities, Congress added amendments designed to increase the attorney general's discretion during preliminary investigations and to tie special prosecutors more closely to Justice Department policy. One amendment even changed the name "special prosecutor" to "independent counsel" on the ground that the old name unfairly stigmatized individuals under investigation, since they might not actually be prosecuted. The argument that ultimately sustained reauthorization was that the new system of independent counsels provided the best way of overcoming apparent conflicts of interest. Congress rejected the view of Associate Attorney General Rudolph Giuliani, representing the Justice Department's position on Capitol Hill, who called the law an effort to govern "by appearance."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

During the balance of the eighties, the independent-counsel law, as it was now called, came to symbolize the partisan inter-branch conflict that marked the later Reagan years. In February 1984, shortly after President Reagan nominated White House Counselor Edwin Meese III to succeed Attorney General William French Smith, multiple allegations against Meese arose during his confirmation hearings. Meese's nomination was put on hold while the independent counsel, Jacob Stein, sorted through various charges, including alleged omissions on financial-disclosure forms. In late 1985 the Democratic majority on the House Judiciary Committee, on the basis of a 3,000-page document prepared by committee staff, formally asked Meese, now the attorney general, to seek an independent counsel to investigate former Justice official Theodore Olson for making false statements to Congress on a matter relating to a contentious dispute between the president and Congress over EPA law enforcement. Alexia Morrison handled the case, and Olson's constitutional challenge to Title VI eventually led to the Supreme Court's 1988 decision upholding the law in *Morrison* v. *Olson*.

In 1986 Whitney North Seymour was named to investigate charges that former Reagan aide Michael K. Deaver had violated restrictions on the lobbying efforts of former government employees. A year later, another counsel, James McKay, was named to investigate similar charges made against former Reagan aide Lyn Nofziger. Nofziger was convicted, but on appeal his conviction was voided on the ground that the law he was accused of violating was too vague. Interestingly, that law was part of the Ethics in Government Act of 1978, which also included Title VI. And just like Title VI, the anti-lobbying law was written to apply *only* to executive-branch officials. As for Deaver, he was convicted on charges of perjury arising from Seymour's investigation—the original premise of which was undercut by the Nofziger appeal.

In late 1986, Lawrence Walsh was named to investigate charges stemming from the Iran-*contra* affair. At the heart of these allegations lay a political dispute between the two elective branches, and the two political parties, over foreign policy in Central America.

The 1987 reauthorization hearings themselves illustrated the sharp conflict between the two branches. By then, both houses were controlled by Democrats, and the Democratic Congress sharply disagreed with the Justice Department's implementation of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the law. Although eight cases were referred to independent counsels between 1983 and 1987, Congress thought that there should have been more. The report on the Senate reauthorization bill by the Governmental Affairs Committee noted with evident alarm that "only 8 cases, or less than one-fourth of the total caseload [of preliminary investigations], resulted in the Department of Justice's request for the appointment of an independent counsel." During 1987 Attorney General Meese became the subject of another independent-counsel investigation, this one stemming from allegations of wrongdoing involving the scandal-ridden Wedtech Corporation.

The reauthorization bill enacted late in 1987 included amendments designed to reduce the attorney general's discretion in implementing the law and to ensure his accountability to the special division of the court and to Congress. This time around, there was hardly any concern about the law's fairness. During the 1988 presidential campaign, the Democratic Party tried to make an issue of what was called "the sleaze factor" of the Reagan administration, citing the various independent-counsel investigations as evidence. Finally free of his second independent-counsel investigation in July 1988, when McKay decided not to prosecute, Meese (in his last act as attorney general) signed an order subjecting members of Congress to the independent-counsel process. Although his successor, Richard Thornburgh, rescinded the order in 1989, Meese's action was a valediction in keeping with the spirit of the times.

It was also during the latter half of the eighties that independent counsels began behaving in unreasonable ways. Whitney North Seymour, for instance, tried to subpoena the Canadian ambassador to the United States while prosecuting Michael Deaver; a federal court ultimately held that diplomatic immunity blocked his effort, but not before U.S.-Canadian relations had been damaged. For his part, James McKay, the independent counsel in the second Meese case, wrote in his final report that Meese had probably committed crimes—something that no ordinary prosecutor who had declined to prosecute would say publicly, for reasons of simple fairness. Most recently, Lawrence Walsh prosecuted John Poindexter on the basis of a law that had rarely, if ever, been applied to statements made to Congress by members of the executive branch. Walsh, moreover, maintains that if an investigation finds "probable cause that a crime has been committed, it is the duty of the independent counsel to prosecute"—a policy at odds with the prevailing Justice Department standard, which holds that fundamental fairness re-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

quires an indictment only if the prosecutor believes that an unbiased jury would *convict*.

The problems with the law

Public records indicate that during the Bush years two more independent counsels have been appointed. One found no basis for prosecuting a minor White House official on charges involving his financial affairs. The other is investigating corruption charges involving former HUD Secretary Samuel Pierce. The Iran-*contra* investigation is still ongoing from the Reagan years. In all, then, since the enactment of Title VI in 1978, there have been at least a dozen different investigations conducted by eleven independent counsels—about one per year, on average.

In one respect Title VI has been an undeniable success. The many court-appointed counsels have indeed been "independent" of the executive branch; they have been free of any real or apparent conflict of interest. And the very existence of the law may have deterred executive-branch wrongdoing, although no one can say this with certainty.

But the record of the past dozen years shows that disastrous results are incurred by a prosecutorial system in which independent counsels, accountable to no one in the executive branch, have unlimited resources to investigate criminal charges of dubious importance, along with vast discretion to choose investigative procedures.

The law has led to far more investigations than ordinarily would have occurred, including those of a "preliminary" nature at the Justice Department. Even those inquiries, however serious, that might have been justified have tended to be lengthier and more costly, both to the taxpayers and the defendants, than they would have been had they been handled through the regular process.

"Nothing is too trivial for [independent counsels] to investigate," commented a Justice Department official in 1987. And so it has been. While indictments and prosecutions have been rare—thus demonstrating that judges and juries are the ultimate (and, by the way, the only) constraints upon independent counsels—the counsels' investigations have tended to be multiple and exhaustive, and to delve into matters both beyond the counsels' original jurisdiction and of little interest to regular prosecutors constrained by a larger justice system in which law-enforcement priorities must be set.

This is how the post-Watergate value of making sure that no executive-branch employee is above the law has worked itself out

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in practical terms. Of course, it has also worked itself out in some (very few) actual convictions. Yet these almost surely would not have occurred had the cases been handled normally. The Justice Department probably would not have prosecuted Deaver or Nofziger, precisely because of the vagueness of the law that they were alleged to have violated; and it is doubtful that the Justice Department would have prosecuted Oliver North or John Poindexter on charges of lying to Congress, because the statutes under which they were charged had not typically been applied in similar situations. After Poindexter's conviction, Independent Counsel Walsh publicly stated that he had been "preoccupied with establishing a legal principle," and he was exactly right; the principle had not previously existed. When it is said that the Iran-*contra* prosecutions teach that no man is above the law, this means in practical terms that criminal laws seldom if ever applied to executive-branch officials in their representations to Congress will now be enforced. Independent counsels thus have registered their disproportionate influence in acts of quite *new* law enforcement, not traditional ones. No independent counsel has investigated a murder, a robbery, or a stolen vehicle. At least in Watergate there was a hotel break-in.

Whatever else may be said about the executive branch over the past dozen years, it has not experienced a crime wave on any conventional reckoning. What it has experienced is an exhaustive effort to criminalize once-legal activities, many involving politics. While this effort has failed more often than not, those investigated have been the guinea pigs of this post-Watergate experiment. Their fates are worthy of sober reflection.

Still, the fate of the executive branch and our system of government is even more important in the grand scheme of things. The Framers of the Constitution placed a high premium on the need for "energy in the executive." But the independent-counsel law, precisely because its procedures can lead to a formal criminal investigation more quickly and on the basis of less-certain evidence than in the ordinary case, has tended to create unjustified caution and timidity within the executive branch. The Olson case is most illustrative. Theodore Olson was the Justice Department official charged with giving legal opinions and advice to the President and his administration. As a result of congressional testimony related to advice he gave the President regarding an assertion of executive privilege, Olson was accused of misleading Congress and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

forced to endure an independent-counsel investigation that lasted three years—at great expense, and to no effect. Those who serve in sensitive positions like Olson's must worry that what once was regarded as ordinary public service may now appear to members of Congress (or to some in the media) as criminal behavior that independent counsels must investigate. This kind of worry produces timid tenures in office and indeed the "feeble executive" feared by Hamilton and other Framers. It is not a recipe for good government.

Perversely, the "ethics law" that is the independent-counsel statute creates and breeds irresponsibility. The law invites presidents to hand off to independent counsels their traditional responsibility for investigating and dealing with charges of misconduct on the part of top aides; President Reagan was quite willing to do that, and often. The law also allows Congress to shirk its responsibility to investigate allegations of executive wrongdoing, through the impeachment process if necessary; indeed, the law is an effort to impeach by other means. Congress may delight in an institution that batters (and impeaches) the executive branch, especially when Congress and the presidency are controlled by different parties, but it does not have to be responsible for what happens.

The statute, it is true, contains explicit provision for congressional oversight of independent counsels, something not usually included in a law of Congress. But I am not aware of a single oversight hearing ever being convened to address the work of a sitting independent counsel in those areas, such as expenditures, that appropriately can be opened to public scrutiny. In late 1987 Rep. Clay Shaw, Jr., asked then-chairman of the House Judiciary Committee Peter Rodino to hold a hearing focusing on "the financial accountability of the currently appointed Independent Counsels." Rodino rejected the request, observing: "I am concerned that such hearings would have a chilling effect on the independence of these investigations and would provide a forum for inquiries into the details of the individual ongoing investigations."

If Congress will not oversee the guardians of the executive branch, who will? In our system, in which all power derives from the people, the question is hardly an idle one. The disturbing fact is that independent counsels are effectively accountable to no one. They can make new law, as Lawrence Walsh is doing in the Iran-*contra* investigation, and they need not explain why they are doing so.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Back to Watergate

The independent-counsel law has had perverse and unintended consequences, not least of which has been to wire the Washington political culture in such a way as to make it think that another Watergate might be around the corner whenever there is some allegation of misconduct involving the executive branch. The statute has helped to elevate the pursuit of misconduct to such a high priority that elites in Washington seem to believe, perhaps unconsciously, that the whole point of our political system is to root out official wrongdoing. That, of course, is preposterous. The ultimate issue is not whether public officials guilty of wrongdoing get the punishment that they deserve, but whether the American people get the good government that *they* deserve. There will be occasions when the pursuit of executive malfeasance must yield to greater concerns that also happen to lie within the president's responsibility. Our politics would be saner without the independent-counsel statute.

And what would happen if the law expired on schedule in 1992? There seems little question that responsibility would be refocused where it should be—in Congress and the president. Presidents would be pressed to confront allegations of wrongdoing, and Congress to investigate and even to commence impeachment proceedings. Both branches could be held accountable for their actions—or lack thereof. The result would be a gain in political perspective and constitutional purpose. The investigation and prosecution of executive malfeasance would cease to have the disproportionate influence upon our politics that they now have. Ordinary politics could be practiced without fear that political disputes would be criminalized and turned over to independent counsels. And the political culture would be freed of the temptation created by the statute to frame allegations of malfeasance in exclusively criminal terms. The president would lose his excuse to postpone, if not to forgo altogether, assessments of the behavior in question in broader terms of ethics and political damage. And resignation would become more viable for those who have engaged in dubious conduct; as it is, individuals use the statute to stay in office while an investigation proceeds, arguing that to leave is to admit the allegations against them.

Of course, presidents or their attorneys general could exercise their discretionary authority to name Watergate-type prosecutors in cases of obvious conflicts of interest. Fewer such prosecutors would

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

be appointed than would be named under the independent-counsel law, but this consequence is hardly undesirable. The decision to name an outside counsel ought to reflect a more balanced judgment than now occurs under the statute, which weights the legal and political scales in favor of a court appointment. In the most serious cases, it is likely that the president would name a special prosecutor.

Supporters of the current system will resist a return to the pre-Watergate system; they will argue that the public cannot have confidence in the work of a special prosecutor named by the president or the attorney general. But they should bear in mind that the old system did work in Watergate. And future presidents no doubt would remember the Nixon example; the prospect of embarrassment and obloquy, and ultimately the prospect of impeachment, should work to prevent a Cox-like firing. Yet even if a special prosecutor is fired, a replacement is likely; after all, Jaworski did succeed Cox.

Watergate remains a seminal event in our recent political history. The lesson it teaches is not the need for the current system of independent counsels, but the viability of our political system. If necessary, ordinary special prosecutors, appointed as they were in Watergate, can investigate charges of misconduct. But the permanent system of court-appointed prosecutors has proved not a remedy but a disease that weakens and impoverishes our political life.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

A conservative defense of Congress

MICKEY EDWARDS

THE ASSIGNMENT was simple: would I please attempt to write a conservative defense of Congress? I can almost hear the laughter. But this was to be an entire issue of *The Public Interest* devoted to a single topic—an examination of the United States Congress—and there had to be some balance, after all. Surely, I could think of something....

This is not supposed to be a philosophical piece, but permit me first the briefest of words about what I perceive the issue to be and why I do, in fact, believe the Congress to be the single most important element in the American political system.

The one essential ingredient of the conservative theory of government—the very essence of our political philosophy—is that the greatest threat to man's liberty is the accrual of power by those who govern him. If man is to preserve his freedom, then the power of government must be limited both in scope and reach. Government power is best circumscribed when it is diffused. The intellectuals who established this unique American system of government—men who incorporated both the advances of European

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

liberalism and the harsh lessons that they had drawn from their own experiences with centralized and unchecked power—held as their central goal the creation of a framework in which power would be divided among competing forces. The branches were meant to hold each other in check; it is supposed to be difficult to change the laws that so directly affect peoples' lives.

Just as the Founding Fathers agreed to set aside their doubts and to incorporate into the Constitution a provision for a presidential veto because they had confidence in George Washington, it is easy for Republicans today to take comfort in the presence of "our" people in the White House. But we need to forget for a moment, or at least to place in historical context, the nine years of Reagan and Bush and remember that just since World War II we have had twenty years of Democratic presidencies. The fact is, the laws and taxes and regulations that so bedevil us exist not because there was too little cooperation between the branches but because there was too much.

It was not by chance that the Framers of the Constitution placed the power of the purse, the establishment of domestic priorities, the approval of treaties, the regulation of commerce, the declaration of war, the confirmation of judges, even the authority to limit the jurisdiction of the courts, in the hands of the people's elected representatives, nor that the establishment of the Congress and the enumeration of its assigned powers is the first decision announced in the Constitution: article one, section one, line one, sentence one, phrase one, point one.

This, by the way, is not lost on the rest of the world. When people take to the streets to demand their freedoms, when they face tanks and machine guns, when they look to America as a model of liberty, it is not the presidency that inspires them. The world has no shortage of strong executives; what it lacks are chambers of people's representatives who are freely chosen and who exercise real power. Executive power was born in the caves of prehistory; legislative power, born in the Magna Carta and the French Assembly, is the heart and soul of the modern liberal tradition (which today's "conservatives" are left to defend, while misnamed "liberals" defend the centralized power of the cave).

From all over Europe, newly free citizens flock to Washington *to look at* the White House and *to study* Congress. One prominent conservative member of Congress has told of seeing visiting Soviet deputies with tears in their eyes as they sat in the chair of the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Speaker in a chamber in which the people hold the real power. As Lech Walesa said in a powerful address to Congress last year, the Congress "for many people in the world, oppressed and stripped of their rights, is a beacon of freedom and a bulwark of human rights." It is, in fact, the Congress, not the presidency, that symbolizes America's commitment to government "of the people, by the people."

Maintaining the conservative legacy

I will not, and cannot, defend many of the current (and changeable) practices of the current (and temporary) leadership of the current (and replaceable) Congress. But the liberal control of the Congress is largely the fault of conservatives—we often field second-rate candidates and insist on talking about things that the voters in Dubuque and Peoria don't really care about, like the gold standard and corruption in Newark. It would be far better to work a little harder (and smarter) at winning elections than to surrender our conservative legacy by jumping on the bandwagon of centralized, "efficient" governmental power.

The Congress *is* changeable. Although a large percentage of incumbents who seek reelection are successful, that has always been the case in American politics; more than 80 percent were being reelected a hundred years ago, too. But there is not, as some people charge, a permanent Congress. Approximately two-thirds of the people who were serving in the Congress a dozen years ago have been replaced; almost all committee chairmanships have turned over at least once, and often twice, in the past ten years. In many state delegations there is not a single member of Congress who was in office when I was first elected fourteen years ago. The Congress is, in fact, a constantly changing body, with a much higher rate of turnover than is found in business, academia, or most significant institutions.

Yet there are increasingly those in the conservative community who, frustrated, apparently find it easier to curse the darkness of the current congressional leadership than to light the candles of intelligent political involvement that are available in a free society. I have written frequently about the dangers inherent in the campaign for a line-item presidential veto, a substantial power that many Republicans support in a bold gamble that no Republican nominee for president will ever lose to some future Michael Dukakis or Walter Mondale. I have had it pointed out to me in rebuttal,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

as though it were a telling point, that even such prominent liberals as Senator Edward Kennedy and Senator Paul Simon support the line-item veto. To this argument I can only shrug and reply: "Of course; but we already knew that they believe in centralized power."

It is helpful, sometimes, to attempt to see ourselves through the lens of historical perspective. What a tragedy it would be if we, the heirs to the single most important political innovation of modern times—the separation of powers, in combination with a careful system of checks and balances—were to surrender that great legacy, almost without debate, in a fit of frustration.

Congress as an institution

Let us not confuse two very different things. The current management of the Congress is faulty; many of the current practices and procedures in the Congress are terrible; the current Congress is inefficient, unresponsive, and undemocratic. But the Congress as an institution is the very center of the democratic experiment—and potentially the most important defender of conservative values.

This raises three questions:

1. Can the Congress be fixed?
2. Is the doctrine of separated powers suitable to this fast-moving modern age?
3. Is the Congress still important to conservatives as a check on executive power?

The answers are: yes, yes, yes.

In response to the first question, Republicans can regain control of Congress by simply learning again how to win elections. There are no shortcuts in politics. Recruit better candidates, identify the concerns of the voters in each congressional district, apply conservative solutions to real problems of real people, stop writing off large blocs of voters—that's how elections are won. I've written extensively on each of these points and I won't attempt to do so again here, but Democratic control of the Congress is not due to evil forces or the juxtaposition of the moon and the stars. We can change it. Those who would lead us in a frantic search for transcendent national issues that will serve as magic arrows to slay the liberal dragon ignore the fundamental lessons of local politics. It is far better to relearn the art of winning elections than to transform our political system, centralizing power even as the people of East-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ern Europe undertake to break up the centers of power in their own governments.

Many of the current problems with Congress would be resolved if the President and others of influence were to add their voices to the campaign for serious congressional reform—demanding the right of the people to have issues debated and voted upon, without restrictive rules of debate (structured by the majority) that block consideration of many proposed amendments; prohibiting the bundling of unrelated spending bills into massive appropriations that defy presidential vetoes; eliminating the power of committee chairmen to announce other members' votes by proxy; extending to the Senate the House's prohibition on unrelated "riders" to legislation. I have introduced a package of such reforms on behalf of the House Republican leadership, and they should remain on the table as a part of any future budget negotiations.

As for the second question, few domestic issues require responses more urgent than Congress is able to provide. Federal agencies charged with dealing with emergencies, whether tornadoes or bank failures, have adequate ability to respond rapidly. The greater problem arises in the international arena. But even though the Constitution divides between the president and the Congress the major responsibilities in foreign affairs, and reserves to the Congress the power to declare war, the War Powers Act delegates to the president the authority to move rapidly and unilaterally in the event of an international emergency, subject to later review by the Congress.

Defending congressional prerogatives

This leads, finally, to the question of whether the restraining power of the Congress—the check against the authority of the executive—is, in fact, important to conservatives. While it is tempting to remind one's readers of such matters as the conservative role in the adoption of the 22nd Amendment, which limits presidential succession; in the promotion of the Bricker Amendment, which would have limited presidential use of executive agreements; and in the congressional resistance to Franklin Roosevelt's effort to pack the Supreme Court with supporters of his New Deal, it is not necessary to resort to these examples from what the modern mind undoubtedly considers to be "ancient history." A few more recent examples may also make the point.

In my first term as a member of Congress—which coincided

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

with the beginning of the Carter presidency—I found myself deeply enmeshed in a nationwide struggle by conservative activists to block the implementation of the treaties by means of which the new President proposed to surrender control of the Panama Canal to Omar Torrijos and his most powerful ally, Manuel Noriega. Given the current conservative tendency to argue that foreign policy is properly the domain of the chief executive, and that the Congress ought to keep its micromanaging nose out of the way, it might be supposed that we held to that same principle during the controversy surrounding the Panama Canal treaties. In fact, the opposite was true: Congress was the last hope of conservatives opposed to the actions of the President. On behalf of conservatives in Congress, I filed a lawsuit in federal court challenging the President's right to surrender federal property without the consent of the House of Representatives. The decision by an appellate court to dismiss the suit on the grounds that individual members of Congress lacked sufficient standing does not dilute the central point: in an attempt to block an action by a liberal president—in a matter of foreign policy, no less—conservatives turned to the Congress and the courts.

It is helpful to continue with examples from the Carter presidency, since many who now disparage the Congress and would invest new powers in the presidency seem reluctant to remember how recently a liberal president sat in the White House.

In 1977 President Carter proposed to stimulate the economy by providing a $50 rebate to each family. It was the Congress that killed the plan: when liberals barely defeated a motion by Representative Barber Conable to substitute instead a tax cut, the rebate scheme was dropped.

In 1978 President Carter attempted to create a new Consumer Protection Agency. It was killed by conservatives in the Congress.

In 1978 the Carter administration announced that it would terminate the Mutual Defense Treaty that the United States had maintained with the Republic of China on Taiwan. Conservatives turned to the Congress to ensure continued U.S. protection of Taiwan. The result, in March 1979, was a decision to continue the U.S.-Taiwan relationship unofficially, with continued security guarantees.

In 1979 President Carter proposed a Hospital Cost Containment Bill that would have greatly increased federal regulation of medical care. The plan was killed by conservatives in the Congress.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

In 1979 the Carter administration proposed a cumbersome emergency rationing plan. Customers would need coupons to buy gas, and gas stations would have to redeem the coupons to purchase more gasoline. The initial cost was projected to be $346 million. Annual administrative costs were estimated at more than $1.6 billion. Conservatives killed the plan in Congress.

In 1980 President Carter proposed a gift of $75 million to the new Sandinista government in Nicaragua. The Congress nearly defeated the aid package and forced Carter to accept sharp restrictions on the use of the money.

In 1980 conservatives used the Congress to defeat President Carter's proposal to create a new Energy Mobilization Board that would have had the authority to waive state and local laws.

Even when Carter won, it was often over the stiff opposition of conservatives who turned to the Congress to resist presidential power. Carter's narrow victory in imposing a windfall-profits tax on the domestic oil industry is one example. Another is the attempt by congressional conservatives to prohibit the World Bank from lending money to governments in Cuba, Laos, Mozambique, Cambodia, Angola, Uganda and Vietnam. Ultimately, the resistance to this plan in Congress forced Carter to accept a compromise that required U.S. representatives to various international lending institutions to "oppose and vote against" loans to the seven countries.

Such battles do not occur only when Democrats occupy the White House. Last year, during the Bush presidency, conservatives in Congress repealed catastrophic-illness health-care legislation and section 89 of the tax code (a provision that would have imposed burdensome regulations on small businesses), despite both provisions having been signed into law by a Republican president (Reagan), and despite the Bush administration's support for them. The current year began with conservatives rallying to use the Congress in an attempt to keep Chinese students from having to return to the control of the government that had used its guns in Tiananmen Square.

Retaining a historical perspective

Despite the persistent (and false) contentions that the Congress is a place of permanent residence, 106 of the 176 Republicans in the House—and most of the conservative Democrats, as well—have served for nine years or fewer. Very few served during a

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Democratic presidency, and it is easy to understand how they could think of the world only in terms of the relatively brief Reagan-Bush period in the White House. It is important, however, to retain a historical perspective. Trite as the expression now seems, it is nonetheless true that if we fail to remember the past, we are pretty likely to repeat it.

I am, as my young son likes to remind me, two years past half a century. Age has its virtues, among them memory, perspective, and context. For more than half of my life, Democrats have held the White House. For more than half of my life, conservatives have had to turn to the Congress in an attempt to prevent liberal presidents from expanding the size, scope, cost, and power of the federal government. I spent my own early years in Congress working with conservatives throughout the country to oppose presidential initiatives in both foreign policy and domestic policy, beginning, in my first year in the Congress, with a concerted campaign to block the Panama Canal treaties. Before we undertake to denigrate the Congress, it would be helpful to look back at recent history. When it comes to the establishment or defense of political institutions, memory is important.

Defend the Congress? The Congress of the United States needs no defense: it is the focal point of the Founders' determination to put the people in charge of their own destinies. Like my colleagues in the conservative community, I am frustrated by continued liberal domination of the Congress and by the authoritarian means that the majority uses to stifle debate and to ignore the public will. But there was a reason why wits of earlier ages cautioned us not to toss out the babies when we dump the bath water. Let us reform the Congress, but let us hold it dear as the guardian of our liberties against the centralization of power.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Congress and the courts

GARY L. McDOWELL

THE CONSTITUTION, as every schoolchild knows (or, at least, used to know), creates an elaborate scheme of separated powers and checks and balances. These "auxiliary precautions," as James Madison called them, were prudently designed by the Framers to increase the likelihood that democratic government would also be good government. Arguably the best known of these checks and balances is the power of judicial review, the power of the courts to declare that laws and actions of the governments—local, state, and national—are beyond the constitutional pale.

Believing that the legislature inevitably would seek to extend "the sphere of its activity" and to draw "all power into its impetuous vortex," the Framers sought to empower the courts to serve as "the bulwarks of a limited Constitution," able to keep the other branches—but especially the Congress—within the bounds of power prescribed by the Constitution itself. Since John Marshall's opinion in *Marbury* v. *Madison* (1803), we have had a more or less constant faith in this aspect of the great design to ensure the limi-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tation of governmental power. In practice, however, the constitutional and political relationships between Congress and the courts are more complicated than constitutional theory might suggest.

As with all the Constitution's systems of checks and balances, that between Congress and the courts is reciprocal. The courts have the power, in Marshall's words, "to say what the law is," and if necessary to declare congressional enactments invalid; but Congress in turn has the power—more clearly spelled out than the courts' power of judicial review—to control the courts. By the unambiguous language of Article III, Congress can create—or refrain from creating—inferior courts; more important, the Supreme Court's appellate jurisdiction (which accounts for most of its business) is granted "with such exceptions, and under such regulations as the Congress shall make." In short, while the Constitution makes the judiciary one of three separate and coordinate branches, it leaves to Congress the power—indeed, the obligation—to fashion the judicial process.

The reason the Framers did this was simple enough. While they thought that the independent judiciary that they created was the "least dangerous [of the branches] to the political rights of the Constitution," they did not think it altogether benign. They were too shrewd for that; they knew that all political power could be perverted, and that "parchment barriers" were an insufficient guard against any power—whether legislative, executive, *or* judicial. The Framers expected that if the courts took it upon themselves to exceed their proper constitutional authority, Congress would restrain them. As Alexander Hamilton noted in the *Federalist*, judges were to be hemmed in by "strict rules" and bound down by precedent.

The politics of judicial activism

No age in the history of the American republic has been free of spirited declamations against the federal judiciary generally and the Supreme Court in particular. Indeed, attacks on the Court historically have been as notable for their vehemence as for their frequency. What surprises, then, is how seldom Congress has seen fit to do anything about the judiciary. Like Charles Dudley Warner's weather, the problem of "judicial activism" is a topic about which there is considerably more talk than action.

From the beginning, federal judges have been tempted to do more than to resolve concrete cases and controversies; the impulse to shape public policy more broadly is a strong one. Thus the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Marshall Court sought to flesh out the meaning of the commerce and contracts clauses; the Taney Court hoped once and for all to silence the political storm over slavery; the so-called laissez-faire Court brandished its doctrinal contrivance of "liberty of contract"; the New Deal Court moved to support ever greater centralization of governmental power; the Warren Court hammered out policies to desegregate society; and the Burger Court attempted to fashion a national policy on abortion. In short, every age has had its activists. But while examples of judicial activism abound, one is hard pressed to think of many examples of successful congressional efforts to curb it.

The one exception was when the Reconstruction Congress revoked a portion of the Supreme Court's appellate jurisdiction, an action that the Court upheld in the case of *Ex Parte McCardle* (1869). Congress thought that the Court, which still largely accepted the jurisprudence underlying *Dred Scott* v. *Sandford* (1857), was likely to declare some of its efforts at Reconstruction unconstitutional. But *McCardle* was a very limited instance that has never been repeated. Most other efforts to check the courts in any meaningful way peter out early on in the legislative process.

Of course, there may be a simple reason for this fact: most exercises of judicial power that seem to go too far have been directed at the states, not Congress. Indeed, the number of national laws invalidated by the Supreme Court is lost in the shadow cast by the stack of judicially discarded state laws. Even during those heady first days of the New Deal, when the Court was struggling to stem Franklin D. Roosevelt's tide of national regulation, it was still busy thwarting state efforts at economic and social regulation. Between 1898 and 1937, for example, the Court issued some fifty decisions invalidating acts of Congress and about four hundred striking down state laws. The Court opposed *all* regulation, not just national regulation.

This explanation is simple, but it is not simplistic. The fact is, the sovereignty of the states has been precarious ever since the ratification of the Constitution. Sometimes the evisceration of state prerogatives has been slow, and sometimes it has been fast—but it has never ceased. As Philip B. Kurland has pointed out, "[T]he relationship of the national judiciary to the original constitutional conception of federalism is not unlike that of predator to its prey."

The clearest example of this evisceration came several years ago in the case of *Garcia* v. *San Antonio Metropolitan Transit*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Authority (1985), when a majority of the Court, overruling its own recent precedent of *National League of Cities* v. *Usery* (1976), announced that whatever constitutional protections the states enjoy against the national government are to be secured by Congress. The Constitution, Justice Blackmun announced, gives the states no independent, judicially enforceable sovereignty; there is, he said, no "sacred province of state autonomy." After *Garcia*, the independence of the states to govern as they see fit is a matter of congressional benevolence, not constitutional principle. In this instance, states and localities enjoyed no immunity from the provisions of the Fair Labor Standards Act even when it came to their "traditional governmental functions"; congressionally mandated minimum-wage and overtime requirements applied to them as well as to ordinary businesses. As Justice Lewis Powell said in dissent, *Garcia* "reflects a serious misunderstanding, if not an outright rejection, of the history of our country and the intention of the Framers of the Constitution."

More than that, however, the *Garcia* opinion points to the greatest oddity about the politics of judicial activism as that politics affects the federal balance of the constitutional order: the dynamic between Congress and the Court is shaped by the fact that both are *national* institutions. As the critics of the Constitution in 1787 knew, the very nature and extent of judicial power created by the Constitution stack the deck against the states.

The New York Antifederalist Brutus (whose essays prompted Hamilton to write the numbers of the *Federalist* defending the proposed judicial power) went to the heart of the matter. "The judicial power," he wrote, "will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution:—I mean, an entire subversion of the legislative, executive, and judicial powers of the individual states." The courts, warned Brutus, not only would have the power to invalidate acts of the legislature as violating the "spirit" of the Constitution, thus making "their power superior to that of the legislature"; but by a freewheeling construction of the document, they were also very likely to push the boundaries of acceptable legislative enactments ever outward. While the legislature, Brutus concluded, "will not readily pass laws which they know the courts will not execute, ... we may be sure they will not scruple to pass such as they know will give effect, as often as they may judge it proper." The end result, he sadly noted, will be to "melt down the states into one entire gov-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ernment, for every purpose as well internal and local, as external and national."

Thus, from the perspective of federalism, Congress rarely if ever will have an interest in curbing the courts. After all, Congress is itself always seeking to preempt state prerogatives in the name of its own allegedly better national judgment. As Brutus knew, the diminution of state power by the courts would inevitably redound to the benefit of the national government generally. Such institutional self-interest can never be expected to spawn principled opposition.

Federalism alone, however, does not explain entirely the politics of judicial activism. There are other reasons—arguably more politically pernicious and constitutionally suspect ones—that move Congress not simply to ignore judicial excursions into policy-making, but to aid and abet such endeavors. At the level of national policy, it is not too much to say that in many ways judicial activism is as much, if not more, the result of willful congressional abdication as of judicial usurpation.

While Congress may find it constitutionally advantageous to allow the courts to restrict the powers of the states in favor of ever greater centralization, it most assuredly finds it politically advantageous to allow—more precisely, to force—the courts to delve into the minutiae of administrative law as well as constitutional law. Simply put, Congress all too frequently passes the political buck to the courts, which are invited to give meaning to otherwise empty statutes. Congress can take credit for legislating on such controversial subjects as civil rights and the environment, while leaving it to the courts to wrestle with the thornier issues and to fill in the blanks that Congress has intentionally left.

As congressional scholar Morris Fiorina has noted, "a policy stand will generally make some enemies." To avoid this, Congress more often than not tends to draft legislation "in very general terms, so some agency, existing or newly established, must translate a vague mandate into a functioning program, a process that necessitates the promulgation of numerous rules and regulations, and, incidentally, the trampling of numerous toes." Since the Administrative Procedures Act empowers the courts to overturn any such bureaucratic decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accord with the law," it is only a matter of time until the courts put the final gloss on the legislation.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Sometimes Congress is even more forthright in its buck passing, and it cuts out the bureaucratic middleman altogether. Much legislation is written precisely to create new causes of action and to open courthouse doors to those who feel themselves slighted under the new law in question. Such politically costly endeavors as the Clean Air Act, the Fair Housing Act, and the Civil Rights Acts all pave a way directly into the federal courts, where it falls upon judges to try to make sense of Congress's pusillanimous prose.

The perverse politics of contemporary administration

Congressional encouragement of judicial activism is, in truth, but a part of a larger congressional impulse: the delegation of congressional power to agencies, regulatory commissions, and so forth. Though not new, the willingness of Congress to delegate its powers has been greatly exacerbated over the past thirty years as a result of the radical expansion of government generally. As the scope of congressional concern has broadened, the depth of its involvement on a continuing basis has grown increasingly shallow; power is now delegated with only the vaguest of guidelines.

Consider the litigational politics surrounding the Occupational Safety and Health Act and the agency it created, the Occupational Safety and Health Administration (OSHA). Enacted in 1970, the law was noble in its purpose and confident of its chances for success. Its aim was "to assure so far as possible" that "every working man and woman in the Nation" will have "safe and healthful working conditions." To pull this off, OSHA was directed to establish a system of standards "which most adequately assures, to the extent feasible, on the basis of best evidence, that no employee will suffer material impairment of health." Given that both organized labor and the business community had vested interest in such rules and regulations, the politics surrounding OSHA's regulatory efforts was destined to be heated and complex. It was inevitable that courts would be dragged into the fray.

In 1980 the Supreme Court had occasion to address the question of the Occupational Safety and Health Act's ambiguity. In *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, the Court was presented with the question of precisely what "feasible" meant when OSHA went about deciding how to balance concerns for safety from toxic substances—in this case, benzene—with costs. The Supreme Court upheld the judgment of the Court of Appeals, which had found that the language in question did *not*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

give OSHA unbridled discretion to adopt standards so stringent as to produce a risk-free workplace regardless of the costs involved.

Justice William Rehnquist went further; in a concurring opinion, he argued that the act was too vague in establishing guidelines for OSHA. As Rehnquist put it, "Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor [and, thereby, to OSHA] and, derivatively, to this Court." In his reading, nothing in the statute or its legislative history provided "specificity to the feasibility criterion." Rehnquist argued that the time had come for the Court to "reshoulder the burden of ensuring that Congress itself make the critical policy decisions" by resuscitating the largely ignored doctrine that Congress may not constitutionally delegate what is essentially the legislative power. The vagueness of the feasibility standard of this act was a clear violation of that doctrine and thus, to Rehnquist, rendered that provision of the law unconstitutional. But as was so often the case in the 1970s, Rehnquist was a lone voice; his brethren were unwilling to revive the nondelegation doctrine. As a result, the ambiguity remained, to be challenged and judicially addressed in other cases down the road.

There are, of course, other factors at work beyond the willingness of Congress to pass vague legislation and the willingness of the courts to fill in the blanks. The main factor that has contributed to this transformation of administrative law has been the rise of so-called "public interest" law firms, such as Ralph Nader's Public Citizen. These are generally nonprofit groups that aim to use the courts to achieve their policy ends. Their goal is to encourage judicial definition of public law through their "agenda forcing litigation."

James Q. Wilson has shown that by 1985, "only one of the twenty-four health standards issued by the Occupational Safety and Health Administration ... was not challenged in the courts." Given this atmosphere, OSHA has all but abandoned exercising discretion in the traditional sense of the term. In Wilson's words:

> The OSHA administrator, like any of us, decided it is better to be safe than sorry, and so before OSHA issues a formal rule it conducts court-like hearings before a qualified hearing examiner, with provisions for cross-examinations. A complete transcript of the proceeding is kept. Since industry often has an interest in avoiding a new regulation it has an interest in protracting these proceedings as long as possible. The combined effect of the judicialization of the agency and the interests of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> the constituents can be measured in time and volume. It takes OSHA an average of four years to devise a new health standard. The record is commensurately long: in the case of a proposed new standard for cotton dust it included 105,000 pages of testimony in addition to uncounted pages of documents.

This process has left the courts seemingly "in the grip of a strange compulsion," as Jeremy Rabkin has argued:

> The compulsion of judges is to believe that if an advocacy group can show that it would obtain better results from a different construction of an agency's legal duties, the group deserves a day in court to urge its own view of what the law requires. And if the judge thinks there is merit in the legal argument, he feels compelled to push the agency in this direction. The inevitable result is that interest groups are encouraged to regard their policy preferences as claims of legal "right," and policy decisions become mired in legalism. Judicial compulsions become policy compulsions.

The cost of this "public interest law" movement to the legitimacy of republican institutions has been high. As more and more public-policy questions are settled judicially by resolving the competing claims of "public interest" litigants, public policy is privatized. As James Q. Wilson has pointed out, the once-sharp line between "rights" and "policy" has blurred. What is an "arbitrary" decision? What does "capricious" mean in the context of any particular law? What are the proper limits of "discretion"? Don't ask us, wails the congressional chorus; ask the courts. Interested individuals and groups now raise claims in court that they are entitled, by this law or that, to certain outcomes. In short, their policy preferences are presented to the courts as matters of legal right. Since Congress has offered little in the way of specific policy guidance, the judicially defined policies that result have little if anything to do with public deliberation.

But Congress has grown generally complacent, if not always downright happy with the situation. While Congress occasionally steps in to correct particular results of the agency-court dance of policymaking, and while it continues to include legislative provisions that suspiciously resemble the legislative-veto device that the Court has declared unconstitutional, on the whole Congress seems willing to let things stand. The political benefits are generally greater—or at least more immediate—than the constitutional costs.

There is, of course, an implicit expectation in Congress's willingness to pawn off onto the courts the important business of giv-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ing content to our national laws. To put it bluntly, Congress expects that the courts will construe its meaning broadly, resolving ambiguities to favor the left. It would be hard to think of a vague or ambiguous statute drafted by Congress with the hope that the courts would give it a restricted meaning. The expectation, rather, is that the courts will ratchet out the scope of the rights that Congress lacked the nerve to create explicitly. It is not hard for Congress to give a precise meaning to laws if it has a mind to do so; it is, however, often politically risky to venture too far beyond what congressional constituencies would be willing to endorse come reelection time. It is better to be safe than sorry.

The strange new politics of judicial restraint

One can see this most clearly when the courts do not play along. Congress is in a quandary when courts interpret a law narrowly; it must take a stand. Nowhere has this been more evident recently than during the Supreme Court's 1988 term, when the Court—bolstered by Ronald Reagan's three appointees—moved to restrict the scope of certain remedial devices in civil-rights law.

The decisions in *City of Richmond* v. *Croson*, *Wards Cove Packing Co.* v. *Atonio*, *Martin* v. *Wilks*, and *Patterson* v. *McLean Credit Union* were particularly irksome to those civil-rights advocates who had come to depend upon the courts to further their causes. Their instant response was, largely, predictable; they charged the Court with rolling back thirty years of progress. In fact, in the first three cases the Court merely restricted the use of procedural tools that had perpetuated policies of reverse discrimination and racial preference.

Patterson roiled the political waters in other ways. The Court caused a major furor within what Richard Morgan has aptly called the civil-rights industry, when the justices—who were not asked to do so by the parties to the case—called for reargument concerning the 1976 case of *Runyon* v. *McCrary*. The *Runyon* decision had broadened Section 1981 of the 1866 Civil Rights Act to forbid private acts of discrimination as well as public ones, specifically forbidding private schools to discriminate on the basis of race in admissions. While the Court voted unanimously to uphold *Runyon*, a five-to-four majority voted against extending its reach to prohibit racial harassment in the workplace.

What makes the *Patterson* case so interesting, however, is not the outcome of the litigation, but the behavior of Congress *during*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the litigation. After recruiting Harvard Law School professor Laurence Tribe to present their case, a sizable number of representatives and senators implored the Court to listen to and be guided by the sounds of their silence. Since *Runyon* was decided, the members argued, they had done nothing to overturn it, nothing to change the terms of the Civil Rights Act of 1866. Thus they claimed that the Court should accord congressional silence the same weight that it accords congressional action. Congress had accepted *Runyon*—even though the decision clearly departed from the original understanding of the law in question—and the Court should not burden the legislature by requiring it to wrestle anew with this dilemma. Leave well enough alone, the congressional brief urged the Court.

The Court's judgment in *Patterson* was not enough for these members of Congress, who also wanted the courts to have the authority to stretch the old law into a variety of new shapes to fit a variety of new claims. To give a truncated interpretation of the civil-rights provision, they felt, was little better than going back to square one by repealing *Runyon*. The *Patterson* outcome, combined with the outcomes of the other civil-rights cases, indicated to Congress that something needed to be done.

Several years before, the Court had behaved in a similar fashion, voting to restrict another provision of the civil-rights laws in a way that Congress found intolerable. In *Grove City College* v. *Bell* (1984), the Court had limited the denial of federal aid to a private school charged with sex discrimination, restricting the cutoff to the particular program implicated in the charge; a general, punitive loss of aid across the board was not what the statute in question intended, the Court declared. Congress reacted in its next session by passing the Civil Rights Restoration Act, making sure that more far-reaching and amorphous standards of relief would be available in such discrimination suits. The 1988-1989 decisions meant that Congress would again have to flex its legislative muscles against an equally uncooperative Court.

Accordingly, umbrella legislation was introduced by Senator Edward M. Kennedy as the Civil Rights Act of 1990. Its provisions are many and varied; its purpose is not. The bill is designed to overrule each of the above-mentioned decisions, along with several other less publicly noted but related decisions handed down by the Court during the 1988-1989 term. The bill has no fewer than thirty-three co-sponsors, Republicans as well as Democrats.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Beyond the particular provisions of the bill, its most striking—and revealing—aspect is to be found in its "rules of construction for civil rights laws." Lest the Court be confused as to Congress's intention, the bill seeks to make the intended ambiguity of civil-rights law crystal clear:

> (a) EFFECTUATION OF PURPOSE. All Federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies.
> (b) NONLIMITATION. Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to restrict or limit the rights, procedures, or remedies available under any other Federal law protecting such civil rights.

Whatever the outcome of the legislation, it is likely that these general principles of construction will remain a vital part of the new law of the land. Taken as a piece, these two rules of construction would empower federal trial judges to fashion their remedial decrees as they see fit in order to address what they find to be practices of discrimination. When coupled with the Court's own enhancement of the power of trial judges in this term's decision in *Missouri* v. *Jenkins* (which allowed a judge to order the government to increase taxes to pay for the costs imposed when he promulgated a remedial decree affecting public institutions), the bill could lead us into an expansive new world of judicial activism.

Congress, the courts, and the Constitution

There was a time, not so long ago, when the Constitution still mattered in American politics. The twin strands of fundamental principle, federalism and the separation of powers, constituted the warp and woof of limited republican government. They were given their great and binding power by a Court that took the Constitution seriously, understanding it as fundamental law. Together these principles provided, as Madison claimed that they would in *Federalist* 51, "a double security ... to the rights of the people." In many ways, unfortunately, they do so no longer.

Rather than proving themselves the "bulwarks of a limited constitution against legislative encroachments," as Hamilton promised, the federal courts all too often have proved to be the handmaids of congressional grasping. Strict construction of the Constitution is nearly always the exception, and loose construction—what Woodrow Wilson once called a "lusty and seductive doc-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

trine"—is the rule. The result has come to be little more than "a scheme of congressional supremacy." When the Court had the chance to restore somewhat the balance of powers in the 1988 case of *Morrison* v. *Olson*, by declaring the independent-counsel law unconstitutional, all but Justice Antonin Scalia shied away. In the wake of *Morrison*, it is not clear how much the separation of powers is actually worth as a fundamental principle.

Together, the judicial diminution of state power and the enhancement of congressional authority have led Congress to take an ever greater interest in keeping the Court on what it sees as the right track. Thus the Senate now takes its constitutional obligation to advise on and to consent to nominations for federal judgeships with unprecedented seriousness. And it is in the exercise of that power above all others that Congress can contribute to judicial activism in the federal courts.

The battle over Robert Bork's elevation to the Court stands out as evidence that the Senate has come to see its role in advice and consent as nothing less than maintaining the ideological directions taken by activist judges over the past thirty years. *Griswold* v. *Connecticut*, the 1965 case in which the Supreme Court discovered the so-called right to privacy in the cracks and crevices of the Constitution, became the ideological club that the Senate wielded against Judge Bork. There was a reason for this: no other case typifies more clearly both the direction of judicial power in America and Congress's institutional approval of that direction. It is safe to say that any future nominee who has ever questioned the constitutional integrity or the political propriety of *Griswold* will suffer Bork's fate. *Griswold* has become the Senate's litmus test for federal judges.

The reason is clear enough. *Griswold*'s judicial creation of a general right of privacy absent from the Constitution's text—it is a right, Justice William O. Douglas contended, that is a "penumbra, formed by emanations" from other textually explicit rights—presents the courts with the power to define that right on a case-by-case basis. The only limit on the definition is that of the judicial imagination. While the right to abortion announced in *Roe* v. *Wade* is hailed as the most manifest achievement resulting from *Griswold*, in fact abortion is but one of innumerable rights that the courts are now empowered to discover and define. What this accomplishes in practice is to nationalize many questions formerly left to the states, while simultaneously absolving Congress from

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

wrestling with these socially volatile and politically divisive issues. *Griswold* enables Congress to leave such issues to the courts to decide as matters of constitutional law rather than questions of mere policy. Politically sensitive state policy questions are thus transformed into judicially defined rights decreed by the federal courts. The line between "rights" and "policy" is no longer merely blurred; it is obliterated.

Congress not only generally accepts judicial activism, but also actively perpetuates it for the simplest of political reasons: self-interest. But the cost of this collusion between Congress and the courts is high. It is nothing less than the diminution of the Constitution as fundamental law, a law meant to be binding unless changed by the solemn and authoritative act of formal amendment.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Micromanaging foreign policy

L. GORDON CROVITZ

THE UNITED STATES was built on the idea that there is no greater political danger or political temptation than the exercise of power without accountability. The Founders would not have been surprised that Congress today routinely yields to this temptation. Congress now tries to micromanage most those affairs—foreign policy—for which its members are held least responsible.

More than any other government program, foreign policy has since the founding of the Republic been the clearest duty and burden of presidents. But ever since sensing the opportunities for expanding congressional power during the Nixon administration, legislators have made unprecedented incursions into the ability of the executive branch to set and to administer foreign policy. This trend helps explain the sometimes ambiguous or irresolute role of the U.S. abroad.

Nearly two decades of micromanagement teach that Congress has one great power in foreign policy. With enough meddling and constraints on the executive branch's discretion to act, Congress can eventually drain the energy of the executive branch.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Congress can then exercise an effective veto over action. What Congress cannot do, by and large, is mandate action of its own. This relationship between the political branches was very convenient for liberal Congresses that favored a more passive foreign policy but that found themselves confronted with conservative presidents, who have been more willing to pursue aggressive foreign policies. The typical result, though, is that we have neither presidential policy nor congressional policy—we have no policy, only paralysis.

This was one lesson of the Reagan administration, which foundered for its last two years when the Iran-*contra* affair was allowed to reach scandal proportion. In any current review of congressional micromanagement of foreign policy, it is important to recall that this was also the political environment in which George Bush prepared for the presidency. Although it is too early to predict, President Bush may be able to reduce micromanaging by fighting back, using the constitutional powers intended to protect his branch of government from Congress.

George Bush and recent micromanagement

At a Federalist Society conference in January 1987, George Bush gave a speech that his aides in the White House Counsel office and in the Justice Department now view as a call to arms. He complained:

> Over the last twenty years we have witnessed a departure from the way we have conducted foreign policy for nearly two centuries. Congress has asserted an increasingly influential role in the micromanagement of foreign policy—foreign operations, if you will—and at the same time Congress through use of laws ... ushered courts and lawyers into an uncomfortable but very visible role in the development of our foreign policy.

As candidate Bush put it a few months later in August 1987 to the American Legion's national convention:

> What kind of wacky world is this where the President is taken to court every time he moves our troops around in the national interest? Sometimes a president must take risks for peace, and he doesn't need to be blocked every step of the way.

It is a sign of how routine congressional micromanagement has become that of the twelve bills that President Bush has vetoed, five were vetoed because they violated the separation of powers by

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

putting unlawful and unwise fetters on the executive branch. The good news, largely unnoticed by Congress and the public, is that President Bush already has taken greater action to protect the prerogatives of his branch of government than any president perhaps since Truman. President Bush's veto statements are often excellent constitutional essays, explaining how legislation would usurp presidential powers and why it is important for everyone (and not just for the President's convenience) that such legislation be vetoed. None of his vetoes based on the separation of powers has yet been overridden.

President Bush's first veto of congressional micromanagement was in July 1989, when he vetoed a resolution that had purported to specify the details of negotiations with Japan on development of the FS-X fighter jet. He also said that provisions ordering the Pentagon to confer with the Commerce Department were an unconstitutional fetter on the unitary executive branch in which only one person—the president—can decide which officials will be consulted for what purposes. President Bush said that Congress had tried to "intrude into areas entrusted by the Constitution exclusively to the executive." He also vetoed a bill that would have legislated protections for Chinese students in the U.S., explaining that he would offer the same protections to the students, but he wanted the flexibility to deal with Beijing without Congress.

An excellent example of micromanaging by Congress was the Foreign Relations Authorization Act for 1990-1991. This act contained a provision aimed at executive-branch officials who solicited funds from other countries. The purpose was to prevent activities similar to those in the Reagan White House that managed to get funds to the *contras* during periods when Congress was vacillating between supporting the rebels financially and cutting off this support. The act would have made it possible for executive-branch officials to be sentenced to five years for their official acts. President Bush explained his veto this way:

> Under some circumstances, this provision purports to prohibit, under peril of criminal sanctions, the use of U.S. assistance of third-party funds by executive-branch officials, and requires presidential reporting of certain discussions concerning provision of assistance even within the executive branch. Because of its vague and sweeping language, it threatens to subject to criminal investigation a wide range of entirely legitimate diplomatic activity, the authority and responsibility for which is vested in the executive branch by the Constitution. The result would be a dangerous timidity and disarray in the conduct of U.S. foreign

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> policy. Such a result is wholly contrary to the allocation of powers under the Constitution.... In addition to these constitutional problems, Section 109 would hamper the nation's foreign policy by criminalizing foreign policy disputes, rather than leaving resolution of such disputes to the political process. By making those who formulate and execute foreign policy serve under a vague and sweeping prohibition, Section 109 would clearly circumscribe the effective, forceful and entirely lawful representation of the nation's foreign policy interests. It is neither wise nor fair to expect the men and women of our foreign service to represent the nation with a sword of Damocles over their heads.

Imagine if President Reagan had used such language to veto the Boland amendments and the law reauthorizing the appointment of unsupervised independent counsel, also known as special prosecutors.

Most micromanaging does not give a president the option of a clean veto. President Bush exercised what appears to be a line-item veto in February 1990, when he said that he would not bind the executive branch to several provisions in the State Department appropriations bill. Congress wanted to prevent more secret diplomatic discussions such as those held in Beijing a few weeks after the Chinese communist government reacted against the democracy groups. The bill would have required President Bush to disclose to Congress any sensitive diplomatic discussions, but Bush said in signing the bill that he did not consider as binding "blanket reporting requirements" because these might "compel the disclosure" of sensitive information. "Legislatively mandated sanctions represent an unwise constraint upon the President's ability to conduct foreign policy," he said.

President Bush again exercised what might be called a partial veto in the form of constitutional excision when he finally signed the Foreign Relations Authorization Act. He signed, but said that he would view several provisions as "advisory," offering the "sense of Congress" but not binding as a matter of law. These were provisions that banned funding for the U.S. delegation to the Conference on Security and Cooperation in Europe unless a congressional representative was included; barred admission to any United Nations representatives who had engaged in espionage against the U.S.; and denied funds for "dialogue" with any PLO representatives who had engaged in terrorism that had killed an American. At least the latter two provisions have great merit as policy, but as purported legal obligations on the executive branch they also violate the constitutional structure under which only the president

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

negotiates treaties (which the Senate only then decides whether to ratify) and recognizes ambassadors.

The Justice Department has filed legal papers justifying its view that presidents have the right and even the obligation to refuse to enforce laws or parts of laws that violate the separation of powers. "The President has the authority to decline, in the absence of a judicial resolution of the matter, to implement a statute that is patently unconstitutional or that he reasonably believes undermines his powers under the Constitution," the Department argued in 1989.

Similar micromanagement has occurred with foreign aid, which typically gets bogged down with extraordinary congressional demands on how money is spent—and which congressional district gets any contracts that might be available. The House Foreign Affairs Committee estimated that in 1989 various laws required 288 separate reports on foreign aid. These laws earmarked the specifics of how 92 percent of military aid would be spent, 98 percent of economic aid, and 49 percent of development aid.

Those who suspect that foreign aid does more harm to the supposed beneficiaries than good will be amused by what happened when President Bush tried to streamline the foreign-aid process to benefit Nicaragua and Panama. Freed of illegitimate regimes by untested new governments, both these countries must be among the most clearly deserving of U.S. aid. There were few partisan disputes over the need to help these governments. Yet Congress missed no opportunity to leave its imprint on the aid bills. Though President Bush asked for $500 million for Panama in January 1990 and $300 million for Nicaragua in March 1990, by late spring no money had been released to either country.

The money was available all along from unspent funds, but several (mostly Democratic) congressmen insisted on trying to tie the aid to extraneous issues. A group of liberal senators decided to tack onto the aid bill a provision that would allow the District of Columbia to use taxpayer funds to pay for abortions. Senate Majority Leader George Mitchell announced that there would be no aid until a child-care bill was passed. Appropriations Committee Chairman Robert Byrd insisted on a $185-million correctional facility for his native West Virginia. Senator Timothy Wirth tried to remove some of the aid intended for Panama to fund prosecutions of white-collar criminals in connection with the savings-and-loan crisis.

President Bush urged in a May 1990 press conference that he be given more discretion in spending foreign-aid funds. Especially

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

with fast-changing events in Eastern Europe, he said, the U.S. cannot wait for Congress to act. "I've suggested that the President be given a discretionary fund out of all this foreign aid so we can accommodate a person that is trying to take his small country and firm up its democracy," President Bush said in response to a question about Eastern Europe. "But I remember my days in Congress."

The decline of presidential powers

Although President Bush has started to use his powers to block micromanagement through vetoes (and even through what appear to be line-item vetoes) of what he considers unconstitutional usurpations of his foreign-policy powers, he still has quite a task. A review of how the separation of powers became so unbalanced gives some idea of how great a challenge remains to restore presidential powers to their place of a generation ago.

The fear that congressional meddling will threaten national security predates the Constitution—and, indeed, helps explain why we had a constitutional convention in the first place. After the Revolutionary War, the states were still at significant risks from the British and Spanish. The federal legislature proved that it could not administer national defense; in modern terms, the country learned that 535 Secretaries of State could not function. The Constitution created a new kind of executive branch, a unified executive that would be checked by Congress but that would also have separate powers that could not be limited by legislation. The Founders envisioned a legislative branch that would deliberate and an executive branch that would act.

The Constitution defines congressional power in limited terms, while the executive power is defined expansively. "All legislative powers herein granted shall be vested in a Congress of the United States," the Constitution says. There is no such "herein granted" to limit the executive branch: "The executive Power shall be vested in a President of the United States." As Blackstone had informed the Founders, one sole executive-branch prerogative must be "national intercourse with foreign nations." That is, the sovereignty required to deal with foreign nations must be somewhere, and that somewhere would be in the executive.

This arrangement required an executive with energy, a word that appears frequently in the arguments supporting the Constitution in the *Federalist*. "Energy" in the executive branch, Alexander

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Hamilton wrote there, is "a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws." The executive branch would be the one of "decision, activity, secrecy and dispatch." It would have to behave with energy to confront what James Madison predicted, in another *Federalist* essay, would be an omnivorous Congress. "The legislative department," he wrote, "is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."

One debate from the Constitutional Convention underscores the preeminent role envisioned for the president. The Constitution says that only Congress has the power to "declare war," but the original proposal was that only Congress should have the ability to "make war." Several delegates objected, saying that the president must have the power to "repel sudden attacks" even if it meant that the president would have the power to "commence war."

The distinction between declaring and making war has been of tremendous significance. The United States has been in only five declared wars, but it has used force overseas dozens of times, ranging from Marine landings to protect citizens and property to the Korean and Vietnam Wars. From the beginning of the Republic to 1970 (the last time a formal accounting was made), presidents ordered troops or significant levels of arms abroad 199 times. In two-thirds of these cases, there was no explicit or implicit authorization by Congress by treaty or resolution, while indeed in several cases there was clear congressional prohibition.

Presidents have taken a broad range of actions without congressional approval. Jefferson sent warships to the Mediterranean to sink Barbary pirate ships; Monroe ordered attacks on Spanish Florida; Buchanan landed troops in Canton, China, after an attack on a U.S. ship; Theodore Roosevelt sent a squadron to Moroccan waters ("We want either Perdicaris alive or Raisuli dead!"); Wilson sent aid to the anti-Bolshevik insurgents; Franklin Roosevelt ignored neutrality legislation in 1940 in order to transfer a flotilla of naval vessels to Britain; Truman sent troops to Korea; Eisenhower sent troops to Cuba; Kennedy quarantined Cuba during the missile crisis; Johnson sent troops to the Dominican Republic; and Nixon sent Marines to Lebanon. More recently, President Carter tried to rescue the Iranian hostages, and President Reagan, without prior

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

authorization, liberated Grenada, attacked Libya, and deployed warships in the Persian Gulf.

In addition to what the Constitution says and what presidential actions indicate about the role of the two political branches of government in foreign policy, the courts also have tended to grant presidents wide unilateral powers. Very few cases have actually been litigated; federal judges wisely often refuse on justiciability grounds even to consider cases. Among the reported cases is one that limits the most blunt tool Congress has for affecting foreign policy—the power of the purse. In *U.S.* v. *Lovett* in 1946, the Supreme Court invalidated a provision that would have denied salaries to three executive-branch officials who had been accused of subversive activities. The justices held, in part, that only the president has the power to hire and fire members of what the Founders intended would be a unitary executive branch. The justices recognized that all moneys appropriated out of the Treasury must be authorized by Congress, but said that the spending power cannot be used to alter the constitutional powers of the other branches. By this reasoning, Congress could not, for example, prohibit the president from spending public funds to purchase a pen to sign veto statements, nor could it withhold funding from any court that invalidated a law.

The leading Supreme Court case in this area raises issues interestingly similar to the legal issues that arose from the Iran-*contra* affair. In the 1930s, Franklin Roosevelt prohibited any arms sales by Americans to warring factions in Bolivia. There was also a joint congressional resolution taking a similar position, but the Supreme Court explicitly upheld Roosevelt's unilateral act. In *U.S.* v. *Curtiss-Wright Export Co.*, the justices explained at some length the preeminence of the executive branch in foreign affairs as distinct from the more equally shared powers in domestic affairs. "Not only ... is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited," the Court wrote. "In this vast external realm, with its important, complicated, delicate, and manifest problems, the President alone has the power to speak or listen as a representative of the nation."

The Court also identified a "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

require as a basis for its exercise an act of Congress, but which, of course, like every other government power, must be exercised in subordination to the applicable provisions of the Constitution." The Court concluded that the discretion required in foreign affairs "discloses the unwisdom of requiring Congress in this field of government power to lay down narrowly defined standards by which the President is to be governed."

Indeed, until recent years, even members of Congress acknowledged that the president must retain a wide range of discretion in foreign affairs; even the most isolationist legislators understood that they could not stop the president from acting as he saw fit to protect national security. Consider the debate after World War I when many in Congress wanted all the troops brought home from Germany. A freshman senator, James Reed, was dissuaded from proposing any legislation by—of all people—isolationist Senator William Borah. The *Congressional Record* of December 27, 1922, notes this exchange:†

> MR. REED: Does the Senator think and has he not thought that the American troops in Germany ought to be brought home?
> MR. BORAH: I do.
> MR. REED: So do I.... Would it not be easier to bring the troops home than it would to have the proposed [disarmament] conference?
> MR. BORAH: You can not bring them home, nor can I.
> MR. REED: We could make the President do it.
> MR. BORAH: We could not make the President do it. He is the Commander-in-Chief of the Army and Navy of the United States, and if in the discharge of his duty he wants to assign them there, I do not know of any power that we can exert to compel him to bring them home. We may refuse to create an Army, but when it is created he is the commander.
> MR. REED: I wish to change my statement. We cannot make him bring them home.... [B]ut I think if there were a resolution passed asking the President to bring the troops home where they belong, the President would recognize that request from Congress.

We have the same Constitution we had in 1922, yet now it is a safe bet that few congressmen would endorse the view of the relative powers of the two branches held even by a Senator Borah.

Or by Senator William Fulbright. In 1961, he expressed this pre-Vietnam consensus on the foreign-affairs power:

---

†This fascinating colloquy was uncovered by Robert F. Turner of the University of Virginia Law School, whose comments on the Reed-Borah exchange at a conference on separation of powers in March 1988 are printed in the *George Mason University Law Review*, vol. 11, no. 1 (1988), pp. 108-109.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> The source of an effective foreign policy under our system is presidential power. It is my conviction that for the existing requirements of American foreign policy we have hobbled the President with too niggardly a grant of power. It is highly unlikely that we can successfully execute a long-term program for the taming or containing of today's aggressive and revolutionary forces, by continuing to leave vast and vital decision-making in the hands of a decentralized, independent-minded, largely parochial body of legislators.

The differences between then and now are Vietnam, Watergate, and the era of divided government, with a Democrat-controlled Congress that prefers inaction confronting a Republican-controlled White House that favors a more aggressive foreign policy.

The War Powers Resolution

The model for congressional micromanagement today is the War Powers Resolution, made law over the veto of the weakling president that Richard Nixon had become by 1973. Along with its progeny, the resolution put significant fetters on presidential power. The War Powers Resolution itself is a lawyer's delight, full of internally inconsistent details that would make its application impossible even if any president had acknowledged its constitutionality—which none has ever done. The resolution says that the president may not use force without congressional approval unless the territory of the United States is under direct attack. Presidents must give Congress a written justification for the deployment of troops into "imminent hostilities" within forty-eight hours; Congress can then require the president to bring the troops back, which the president must do within sixty days (or in some cases ninety days) unless Congress grants an extension of time or declares war.

Presidents may not accept the legality of the War Powers Resolution, but it has had practical consequences. Any deployment of troops—such as the Marines sent to Beirut in 1983 as a quick show of force, only to be killed in their barracks—is subject to a possible sixty-day limit, which must affect strategy. Probably the main effect of the resolution, however, comes from its requirement that the president "consult" with Congress before risking imminent hostilities. This makes secrecy nearly impossible, while giving congressmen a chance to blackmail the president by threatening to go public before or during a secret operation.

Legislation after the War Powers Resolution mimics its reporting requirements by mandating a continuing justification for policy

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

by administrative officials. Such requirements are appropriate to the extent that Congress needs information in order to deliberate, but they can also foster obstructionism. One measure of this burst of new reporting requirements is the number of legislative restrictions on the executive branch's conduct of foreign policy. According to Senate Foreign Relations Committee volumes entitled *Legislation on Foreign Affairs through 1986*, there was one such statute before 1900; fewer than thirty by 1950; 189 between 1950 and 1980; and 191 just between 1980 and 1986. There are dozens of congressional committees to "oversee" foreign policy. The new role of Congress is signaled by the fact that over the past twenty years, committee staffs have tripled in the House of Representatives and nearly doubled in the Senate.

Congressional oversight of the Central Intelligence Agency is a perfect example. Eight congressional committees now receive copies of the agency's daily national-intelligence report. Congress receives some 5,000 reports of one kind or another from the CIA every year. Robert Gates, who was deputy director of the CIA, has written in *Foreign Affairs* that this information has many uses; among other things, intelligence is "often used to criticize and challenge policy, to set one executive agency against another, and to expose disagreements within the administration." Gates wrote that the agency is now "involuntarily poised nearly equidistant between the executive and legislative branches." He added, "Such a central legislative role with respect to an intelligence service is unique in American history and in the world. And policy-makers know it."

President Bush tried but failed to avoid a new fetter on the CIA. In December 1989 he signed legislation creating a post for an outside "inspector general" within the agency. The holder of this statutory office is required to report to congressional intelligence committees twice a year on a wide range of issues, including any "abuses and deficiencies" in any CIA programs. This vague mandate effectively puts a creature of Congress inside the CIA, charged with reporting back on any issue that might interest members of Congress. President Bush signed the authorization bill despite his concerns that this new position "could impair the ability of the CIA to collect vitally needed intelligence information by creating a perception that confidentiality cannot be guaranteed." He warned Congress, probably in vain, not "to micromanage the CIA through the vehicle of a statutory inspector general."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Criminalizing politics

The fight over new legal constraints on the CIA is related to the newest weapon in the congressional arsenal to be used against the executive branch: the criminalizing of policy differences between Congress and the presidency. Many fear that the new potential prosecutor in the CIA will lead to criminal indictments against agents who, after all, are in the business of routinely violating the laws of other countries. Under some views of U.S. law, these "offenses" abroad could be the basis of prosecutions at home. This fear seems especially well justified after the Iran-*contra* affair, which showed how Congress—armed with an independent counsel whose sole task is to investigate alleged wrongdoing by executive-branch officials—can send officials to jail.

The most famous descendant of the War Powers Resolution is the series of Boland amendments that restricted aid to the *contras* in the mid-1980s. The version passed in 1984, as a rider to an omnibus appropriation bill, said that "no funds available to the Central Intelligence Agency, Department of Defense, or any other agency or entity of the United States involved in intelligence activities" can help the *contras*. This wording removed the CIA from the field. The best reading of the amendment is that it did not apply to the National Security Council, which is how the executive branch interpreted Boland. Oliver North became the *contras'* lifeline. In one of the famous computer messages uncovered during the Iran-*contra* investigation, North complained to his superior, John Poindexter, about this limitation by Congress. "What we need is to get the CIA re-engaged in this effort," he wrote in 1986, "so that it can be better managed than it is now by one slightly confused Marine Lt. Col."

It's worth remembering that no court in any of the Iran-*contra* prosecutions held either that the NSC was covered by the Boland amendments or that the diversion of profits from the Iranian arms sales to the *contras* violated any law or the Constitution. Independent Counsel Lawrence Walsh decided not to bring any charges that the diversion was illegal. Instead, he prosecuted defendants largely for secondary offenses, such as misleading Congress. Walsh was probably wise not to bring broader cases; when he issued legal papers suggesting that Congress was intended to have the preeminent role in foreign affairs, the Justice Department issued a brief withdrawing that interpretation as the view of the U.S. government.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

But it is also clearly true that President Reagan weakened the institution of the presidency by failing to veto the omnibus appropriations bill that included the Boland amendments, and then by contributing to Congress's efforts to criminalize policy differences by appointing an independent counsel of unlimited duration to prosecute his loyal aides. President Reagan did not authorize the diversion to the *contras*, but the diversion itself was not illegal. As the minority congressional report on Iran-*contra* pointed out, President Reagan could simply have said that the diversion was not authorized, but that there was also no reason to treat it as a criminal act. Instead, President Reagan's last two years in office were badly marred by the affair.

Nicaragua may soon emerge from its Marxist era, but the battle at home will have a longer-term impact on American policymaking. The institution of the independent counsel has transformed the locus of policymaking from the two ends of Pennsylvania Avenue to the federal criminal courtrooms. Consider this exchange between judges on the U.S. Court of Appeals for the District of Columbia Circuit and a deputy to Lawrence Walsh:

> COURT: So if the President and the Independent Counsel have a disagreement over foreign policy and its implications for a prosecution, then the Independent Counsel has the last word?
>
> INDEPENDENT COUNSEL: That's right, that's right. If I understand the hypothetical, I think in principle the answer has to be yes.

In other words, once an independent counsel has been appointed in such cases, foreign policy can become the jurisdiction of the courts. Congress can now add possible criminal punishment to its arsenal of weapons against the executive branch.

This criminalization of policy differences is related to the more general erosion of *political* accountability for foreign policy that has resulted from the confusion over who's in charge. Voters have no one to point to when neither political branch and neither political party accepts accountability for the results of foreign policy. Individual legislators rarely have to answer for their foreign-policy actions; House of Representatives Speaker Jim Wright, for example, was brought down because of ethical lapses, not for running his own foreign policy and negotiations that benefited the Sandinistas. Presidents may still have ultimate responsibility for defending the national security, but they can with some justification point to a meddling Congress.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

One bonus of improving East-West relations could be a respite from these acrimonious and partisan battles over the separation of powers waged by an imperial Congress against increasingly weakened presidents. George Bush has done more in his first two years in office than any president in many years to protect the tattered powers of the office from further micromanaging. But he has plenty of work ahead if he aspires to go beyond containment to roll back Congress's power.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Micromanaging the administrative agencies

JEREMY RABKIN

THE FEDERAL BAILOUT of savings-and-loan institutions is now projected to cost more than $400 billion over the next decade—more than the total cost of the Vietnam War. Many individual scandals went into making the debacle, but to focus on them may be to miss the central point. A recent paper prepared for the National Bureau of Economic Research by two long-time students of congressional involvement with administrative programs, Thomas Romer of Carnegie-Mellon and Barry Weingast of the Hoover Institution, blames much of the problem on congressional champions of the thrift industry; as the authors demonstrate, key congressional factions entrenched in particular committees and subcommittees were preoccupied with assisting narrowly defined "constituencies" and averted their gaze from the larger issues at stake. Though it was this behavior that allowed the crisis to reach its current staggering dimensions, the authors insist that Congress's activity was "relatively routine" and "fits into a more general pattern of the way Congress responds to constituencies and to regulatory developments."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Ever since the Vietnam War, champions of congressional power have consistently warned against excessive executive discretion—and Congress has become far more assertive in a whole range of areas. Perhaps the S&L scandal can finally focus attention on the corresponding dangers of an unchecked Congress. Whatever disagreements there may be about the proper apportionment of blame, the fiasco illustrates a pervasive characteristic of congressional politics: Congress is preoccupied with parochial constituencies at the expense of larger national concerns. As a result, Congress's increased readiness to assert its will—or the will of its committees—in even the smallest details of administrative programs is a recipe for dangerous and costly abuses.

It is in this context that complaints about congressional "micromanagement" of administrative activity ought to be assessed. Such complaints are bound to have a partisan edge when Congress is dominated by one party and the White House is in the hands of its partisan rival. And defenders of Congress can rightly assert that complaints about excessive congressional meddling are as old as Congress itself. Still, there is more than partisan griping in contemporary complaints about congressional meddling, for "micromanagement" takes on a different and more ominous meaning in the contemporary constitutional context.

Micromanagement in the past

In the nineteenth century, it is true, Congress kept an extremely tight hand on government operations. A glance at *Statutes at Large* reveals Congress busying itself with the most minute details of administration. In the 1850s, for example, Congress thought it worthwhile to specify that civilian paymaster clerks making their rounds through army forts should be able to eat with the soldiers but should receive only "one ration per day when on duty at their stations, to be commuted at the price now authorized when travelling on duty." Post Office contracts with Atlantic shipping lines were also regulated by appropriations in astonishing detail ("one additional trip on the Havana line and one additional trip on the Bremen line"), and Congress was quite prepared to single out individual projects for protection ("the bridges across the Ohio River at Wheeling in the State of Virginia and at Bridgeport in Ohio ... are hereby declared lawful structures in their present position of elevation ... anything in the laws of the United States to the contrary notwithstanding"). During the Civil War, Congress was

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

constantly directing the War Department on the details of contracts with military suppliers, and it often intervened even on individual promotions and staffing decisions within the army. Afterward, Congress was more than willing to concern itself with the details of a vastly shrunken government budget (an 1888 appropriation specifies $540 for "an encaustic tile floor for the laboratory connected with the Bureau of the Mint") and to intervene in military administration for the sake of individual constituents. All such matters were duly published as "public bills."

The scale of "private bills"—usually appropriating money from the treasury for specified individuals to settle particular financial claims against the government—had increased to such an extent by the turn of the century that they had to be published in a separate volume each year, as large again as the annual volume of "public bills." This pattern did not cease until 1948, when the newly expanded jurisdiction of the Court of Claims allowed Congress to cut back on such private bills. By that time Congress could look back on more than a half-century of similar reform efforts designed to accommodate the demands of modern government.

This seemed to be the inescapable trend of the twentieth century: Congress was to pull back from petty details so as to consider important public-policy issues more rationally. Civil-service reform at the turn of the century was supposed to relieve Congress of the temptation to play patronage games with the federal work force. The Budget and Accounting Act of 1921, which established an executive budget bureau and an annual process for developing comprehensive executive budget proposals, was intended to help Congress view individual appropriations in a larger context and in more systematic terms. And the organization of an official Executive Office of the President at the end of the 1930s was designed to extend the staff capacities of the chief executive to provide overall guidance to Congress. As late as the mid-1960s political scientists complained that Congress had become preoccupied with screening or thwarting the legislative proposals of the president; despairing of any productive legislative role for Congress, some political scientists actually urged Congress to focus more energy on oversight activities, where it might usefully highlight administrative failings.

Congress did, however, produce many new legislative ventures in the early 1970s. Most of the environmental, safety, and civil-rights regulations of the period were initiated by Congress and developed with only marginal influence from the Nixon and Ford

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

administrations. By the mid-1970s, Congress had become much more cautious about new legislation, and it has since become much more engaged in oversight—or micromanaging. Yet in several ways this is not simply a return to the historic patterns.

Big government, big Congress

The first and most important difference between contemporary micromanagement and the traditional pattern is that the scale of government today is vastly larger. And perhaps the most important implication of this fact is the most obvious: the costs of misguided interventions can now be staggering. The S&L crisis is the obvious example.

It is perfectly true that programs with enormous and miscalculated costs can be directly enacted in general statutes. This has happened often enough. Social-security payments rose at a staggering pace during the 1970s, in large measure because of misguided congressional tinkerings with benefit formulas. Wishful thinking in Congress also produced dramatic increases in payments under particular programs, like the compensation system for coal miners suffering from black-lung disease. But such directly legislated disasters are only part of the problem.

More often, Congress does not miscalculate but simply refuses to calculate—at least as a deliberative body. It initiates large projects without providing much statutory guidance. But it does not want to trust executive agencies to use their discretion, even when Congress as a whole has trouble deciding how to limit executive discretion. So committees and subcommittees, claiming to speak for the whole Congress, often have almost complete free rein to impose favored schemes. This tendency has been exacerbated by the proliferation of subcommittees in the early 1970s and the overall tripling of congressional staff.

Recently the trend toward micromanagement has been most evident in the Defense Department, but examples are legion in other programs too. As a report from the Office of Management and Budget has recently noted, minutely detailed restrictions in appropriations riders and committee reports impose sizable management burdens on every department and agency of the government. The Department of Veterans' Affairs, for example, has been prohibited from contracting out any activities that it classifies as related to direct patient care, though savings from such arrangements might reach almost half a billion dollars. The department and its precur-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

sor have not closed a hospital in forty years, and Congress seems determined to perpetuate this state of affairs. By law the department must notify Congress six months in advance of staffing changes that affect as few as three of its 240,000 employees; in recent cases, pressures from individual congressmen and senators have blocked measures affecting as few as ten employees. To make its point, Congress has attached riders to the department's budgets prohibiting the department from even considering cost-benefit issues in its allocation of resources and services. The result is not to ensure generous service to veterans but to freeze service patterns from earlier decades, even when this means that particular areas are now poorly served.

Similar kinds of parochialism are evident in many other congressional interventions. Congress has enacted numerous measures to encourage energy conservation. But it is so solicitous of users of federally produced hydroelectric power that, since the early 1980s, it has ritually reenacted appropriations riders prohibiting executive agencies from conducting "any studies relating to or leading to the possibility of changing from the currently required 'at cost' to a 'market rate' method for the pricing of hydroelectric power."

The House Agriculture Committee has been similarly intent on protecting indebted farmers. In 1987 it drastically slashed funds for the Office of the Administrator in the Farmers' Home Administration (FmHA), preventing the agency from developing effective loan-repayment policies and procedures. The following year, the committee inserted an appropriations rider that directed FmHA to ignore past delinquency or indebtedness in reviewing farmers' applications for new "loans."

Unfortunately, the pork barrel is not the only motivation for micromanagerial interventions of this kind, nor are such interventions limited to programs in which there is ongoing ideological conflict. Armed with extensive staff support—and the capacity to punish inattentive agencies with budget restrictions and highly burdensome reporting requirements—congressional committees have even hampered the administration of programs with broad congressional support and few pork-barrel implications.

The war on drugs is a good example. Across Congress, fifty-four committees and subcommittees now claim some oversight responsibility for combatting drugs. Although most of their activity consists of posturing for diverse constituencies, rival committees have been quite prepared to press divergent or tangential concerns in

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ways that significantly affect policy. In the fall of 1989, for example, the Bush administration launched the so-called Andean initiative to help governments in Latin America limit cocaine production in their countries, and Congress readily appropriated funds to supply helicopters to Bolivia and Peru. But nine months later the helicopters still had not been delivered. The reason was that the law under which Congress had appropriated the funds specified that the equipment must actually be "sold" to the foreign recipients, who would then have legal title to such equipment. In 1986, however, Congress had amended a different law, the Foreign Assistance Act, to specify that aircraft provided to foreign governments to combat narcotics must only be lent, so that the United States retains the legal right to repossess aircraft that are used for improper purposes. Staffers on the House Foreign Affairs Committee have insisted that this amendment ought to apply to the helicopters slated for Bolivia and Peru, even though the appropriation was not made under the Foreign Assistance Act. This stance has generated much objection from the Defense Department and from lawyers in the State Department, whose position seems to square with the expectations of the Armed Services Committees. But the executive Office of National Drug Control Policy—which was created by Congress to smooth over jurisdictional disputes—characteristically has feared to buck the congressional committees and to make a decision on its own. The helicopters have stayed in the United States.

As this example reminds us, the federal government today is not only vastly larger but also has far more ambitious global responsibilities than in the nineteenth century. Congressional micromanagement thus has very different implications today than when Congress fussed over bridges in Ohio.

More regulation, more reformers

Like spending programs, regulation has increased dramatically in the past twenty years, providing many new opportunities for piecemeal intervention. And as in spending programs, congressional micromanagement in regulatory programs can be extremely costly, because cumulative costs imposed by regulatory programs now run in the hundreds of billions of dollars. In some ways, intervention in regulatory matters is even more troubling than intervention in spending programs, because the costs are not borne directly by the taxpayer. Now that the deficit imposes budgetary constraints

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

on Congress, this feature of regulation makes it a particularly tempting field for intervention.

The underlying problem is not new. However one assesses the general social value of regulation, particular regulatory standards or decisions will impose particularized costs on some interests and generate a range of particularized benefits for others. But apart from the sheer increase in volume, the politics of regulation has changed in two ways over the past twenty years. First, most of the new regulatory programs make much more use of general rules and standards, rather than relying on case-by-case adjudication; this seems to encourage congressional involvement, by making it appear more legitimate. Second, advocates of most new regulatory programs have claimed higher social ideals—such as environmental quality or racial justice—than those invoked for older regulatory programs. Even ostensibly high-minded programs, however, invite less high-minded political pressures, since they impose costs in some areas and generate benefits in other areas.

Of course, high-minded programs with messy politics are hardly unique to the last twenty years. As economist Bruce Yandle has noted, a simple model of such politics is nicely illustrated by the strange alliance behind one of the great moralistic programs of the nineteenth century—prohibition. Campaigns to suppress the sale of intoxicating spirits in individual counties were usually led by well-meaning reformers, like Baptist clergymen. But there was also strong support for such measures from bootleggers, who expected to profit from the suppression of legitimate vendors. One simple way of characterizing the change in regulatory politics in recent decades is that the contemporary climate ensures that special interests have many more reformers to strike alliances with.

Sometimes these alliances can shape decisively even general statutory enactments. Yale law professor Bruce Ackerman called attention to one such venture in his account—aptly named *Clean Coal, Dirty Air*—of special-interest provisions in the Clean Air Act Amendments of 1977: by requiring expensive scrubbing equipment for all coal-burning plants, regardless of what sort of coal they used, Congress contrived to encourage use of cheaper but more-polluting eastern coal—much of which just happened to be mined in the home state of Robert Byrd, then Senate Majority Leader. Similarly, economist B. Peter Pashigian has demonstrated that support for the same statute's blanket prohibition of increases in air pollution, even in areas untroubled by pollution, was most strongly sup-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ported by the representatives of northeastern and midwestern states, which stood to gain from imposing tight restrictions on competitive economic development in less polluted western and southern states. The Clean Air Act Amendments of 1990, now making their way through Congress, are sure to provide similar examples for scholarly analyses.

The trend toward micromanagement

But getting such deals through the entire Congress and past the president, especially in general legislation, is difficult. That is surely why Congress has postponed the reconsideration of Clean Air Act amendments (supposed to be enacted in 1982) for almost a decade. Enter micromanagement.

A few recent examples illustrate the pattern. The 1980 Superfund legislation, amended in 1986, prescribes standards for the cleanup of toxic-waste dump sites under the direction of the Environmental Protection Agency. The legislation directs the EPA to ensure that water flowing under or through a cleaned-up site should be "clean," without adequately defining the term. In the spring of 1989, after years of consideration, the EPA proposed applying standards that it had developed under the Safe Drinking Water Act, which requires that water be entirely safe for human consumption but not free of all detectable impurities. But a subcommittee of the House Energy and Commerce Committee issued a report protesting that this standard was motivated by the EPA's reluctance to impose a more rigorous standard—in other words, motivated by the EPA's consideration of costs. And the subcommittee insisted that the EPA was not authorized to consider cost at all under the relevant provisions of the Superfund program. Evidently in response to this censure, the EPA reversed ground and promulgated a far more rigorous—and far more costly—standard for acceptable levels of cleanliness in cleaned-up sites. This approach was strongly supported by environmental advocacy groups, always more fearful of compromises than of costs. It was also strongly supported by companies that contract with the EPA and with local governments to undertake such cleanup work.

Sometimes congressional committees can be even more particular in demanding favorable regulatory treatment for "friends" with credentials as reformers. Take the case of Thomas Galloway, former staff assistant on the House Committee on Interior and Insular Affairs chaired by Rep. Morris Udall. Among other pro-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

grams, this committee oversees the Department of the Interior's Office of Surface Mining (OSM), which is responsible for enforcing the Surface Mining Control and Reclamation Act. This 1977 act includes a provision for "citizen suits" against the Interior Department for failure to discharge its mandatory duties under the act. The act also includes a provision for reimbursing the attorney fees of plaintiffs in successful citizen suits. In the early 1980s, citizen Galloway, acting through an organization called "Save Our Cumberland Mountains," sued Interior for issuing new mining permits to companies that had not yet corrected past safety violations cited by the OSM. Initially rebuffed in court, Galloway succeeded (with help from Udall's committee) in pressuring the Interior Department to settle the case; he eventually collected $1.5 million in attorney fees for his troubles, then the largest such fee award ever signed by the federal government.

In response to Galloway's suit, the Interior Department agreed to improve its tracking of the safety records of new permit applicants by establishing a computerized "Applicant Violator System"—a system that Galloway designed. And the House Interior Committee held successive hearings to goad the OSM into expanding and refining this tracking system in ways desired by Galloway. At the beginning of 1989, the General Accounting Office issued a report, commissioned by the committee, that still found fault with the system. Two months later, former committee staffer Galloway returned to court to demand further improvements in the system in line with this report.

While no one disputes that genuine abuses in surface mining ought to be regulated, there is little reason to think that Interior's expanded tracking system will help the OSM focus on the most serious abuses, since it has proved to have little value in the past. Indeed, in an era of tight OSM budgets the elaboration of this tracking system has diverted resources from field inspectors to computer specialists. Its main value seems to be in helping the United Mineworkers Union (with which Galloway, a former general counsel, has close ties) in tracking ownership links among different mines to enhance its leverage in labor disputes.

Similar patterns can be observed in many other areas. In 1977 Congress enacted the Community Reinvestment Act (CRA). The measure directed the Federal Reserve and other financial regulatory agencies, before approving any proposed expansion or acquisition of a regulated bank, to "assess the [bank's] record of meeting

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the credit needs of its entire community, including low- and moderate-income neighborhoods" and to "take such record into account" in evaluating expansion plans. A moribund measure in its first several years, the CRA suddenly became prominent in the mid-1980s, when so-called "community activists" began filing protests with the Federal Reserve against the approval of new merger or acquisition proposals by banks that they claimed had failed to serve "community needs." Banks then began offering payments to activist organizations to deter such protests, though a number of bankers openly admitted that they regarded this practice as a form of extortion. Congressional banking committees held hearings on the matter—and demanded that regulatory officials pay more heed to the activists. A rider to the latest S&L bailout legislation stipulates that regulatory agencies must make their CRA assessments public, a provision that helps community activists target banks for pressure. A vague statutory directive about "meeting the needs of the community" has come to mean, in practice, that private banks must help fund the projects and the operations of self-styled community activists.

In other cases as well, Congress has pressed for regulatory standards that help favored constituencies without worrying about the benefits to society. A notorious example is the system of racial preferences developed by the Federal Communications Commission in awarding broadcast licenses. The FCC favors "minority owned" broadcasting ventures without requiring any assurance that such ventures will hire more minority workers or offer programming tailored to minority audiences. The various FCC regulations that support this scheme were not developed under particular legislative standards, but particular congressional factions have certainly kept an eye on FCC policy in this area since the early 1970s. When Reagan appointees sought to scale back the range of such preferences in the late 1980s, Congress quickly appended riders on successive appropriations bills to force the retention of existing policies.

In the past decade, in fact, Congress has become so ready to invoke its power of the purse to protect regulatory constituencies that it often does not even feel obliged to wait until the constituencies come forward with reformist allies. In the early 1980s, for example, the Office of Management and Budget sought to examine marketing orders approved by the Department of Agriculture. These orders were essentially cartel measures, by which the gov-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ernment authorized the producers of basic commodities to restrict their output so as to force up their prices. But Congress was swift to block any serious examination of the marketing orders. It enacted an appropriations rider forbidding the OMB to spend any money to review them, and it has reenacted this restriction every year since.

In an era when the reach of federal regulation presents vast new opportunities to extend favors to specialized constituencies, Congress has squarely faced the temptations—and refined its techniques for pursuing them.

Constitutional conflict, constitutional cynicism

The increasing prevalence of such restrictions on operating budgets has greatly aggravated the problem of micromanagement. As recently as 1979, an article in the *Yale Law Journal* could point to the use of appropriations riders to veto particular executive operations as a new, disturbing, and possibly unconstitutional phenomenon. In the 1980s this tactic became quite routine, and it was used to advance the pettiest congressional concerns at the expense of quite serious policy matters. In 1989, for example, Congress appended a rider to the Department of Justice's appropriation forbidding the department to undertake any internal reorganization or transfer of personnel—all to prevent Justice from closing down a two-person FBI office in Butte, Montana. In the meantime, as Attorney General Thornburgh has recently complained, the department was forbidden to reorganize its strike force against organized crime.

Not all such actions raise constitutional questions. But it is fair to say that in the past decade Congress has thrown off almost all constitutional inhibitions that might have restrained it from imposing its will on executive operations. Thus in the mid-1980s, another rider to a Justice Department appropriation forbade the department to argue its position on a complex antitrust question before the Supreme Court—because factions in Congress disagreed with this position. Another rider prohibited the Federal Trade Commission from spending any funds to study or investigate the same issue. In 1989 Congress adopted an appropriations rider forbidding the Interior Department to keep any record of inquiries or communications received from individual congressmen or their staffs.

Congressional determination to manage executive decision-making does not even seem to be restrained by contrary Supreme

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Court rulings. In its 1983 ruling in *INS* v. *Chadha*, the Supreme Court held that Congress could not veto executive actions outside the normal legislative process. Congress responded by creating new "veto" provisions that go into effect upon the vote of an individual committee or subcommittee. This practice was defended on the grounds that the committee vetoes would not be legally binding—though in practice agencies dare not defy them. But by the fall of 1989, Congress had shaken off even these inhibitions. It enacted a rider to the appropriation for the Executive Office of the President specifying that no funds from the appropriation "shall be used to implement, administer or enforce any regulation which has been disapproved pursuant to a resolution" of Congress. Since such resolutions are not subject to presidential veto, this was the very sort of scheme that the Supreme Court had condemned as unconstitutional.

One can find isolated precedents for some of these efforts in the nineteenth century, and lawyers can certainly argue the merits of individual cases. But most of the historical precedents come from the era after the Civil War, when Congress sought to impeach a president, to insulate its actions from judicial review, and generally to assert its authority over all aspects of federal policy. Precedents from this era are not generally considered sound. Still, congressmen and prominent lawyers now openly assert that Congress can use its power of the purse to impose any limitation whatsoever on the president and the executive branch, since no money can be expended without congressional approval and virtually any executive action—even an initial investigation of facts or a consultation with third parties—must be sustained by salary payments and other expenditures.

How can we account for this trend, so at odds with the expectations of the Framers? Part of the new congressional assertiveness doubtless stems, as has often been argued, from the past two decades of partisan tensions between a Democratic Congress and a Republican White House. But the pattern of congressional interventions by no means disappeared under the Carter administration. Similarly, it is often argued that Congress was provoked into greater intervention by the high-handedness of the Nixon and Reagan administrations. Yet the pattern has not weakened under the far more conciliatory Bush administration.

One factor that should perhaps be given more weight in explaining the erosion of Congress's constitutional scruples is the influ-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ence and example of the federal judiciary. In principle, the most extreme formulations of congressional authority are as threatening to the independence of the judiciary as to the independence of the executive. If Congress can micromanage the executive through its power of the purse, why not also the courts? In fact, Congress has already come close to doing so. In the 1988 omnibus budget resolution, Senator Shelby of Alabama inserted a rider forbidding the Justice Department to enforce a judicial writ in a particular case, a move that assisted a Shelby contributor who was facing a $20-million court judgment. Some inkling of the threat that congressional overreaching poses to judicial independence seems to be reflected in the handful of Supreme Court decisions over the last fifteen years that adhere to a strict understanding of the separation of powers.

But on the whole, courts have been willing and eager partners in the expansion of congressional power to help specialized constituencies. The Supreme Court, for instance, has never seriously attended to the constitutional problems raised by the citizen-suit provisions scattered through most of the environmental and safety legislation of the past two decades. Similarly, courts in the past two decades have become extremely attentive to directives in committee reports when interpreting laws, though the committee reports—unlike the actual statutes—have not been voted on by the entire Congress and often represent the views of particular factions, eager to accommodate constituencies. Indeed, the courts have anticipated and improved on congressional provisions, liberalizing the law of standing and the availability of intrusive remedies in the 1970s even when not directed to do so by Congress. Despite some rhetoric to the contrary—mostly in dissenting opinions—the general trend continued in the 1980s. In an era when courts have assumed the power to impose taxes, to manage the details of school districts and prisons, and to intervene on an unparalleled scale in the internal affairs of executive agencies, is it any wonder that Congress has little regard for constitutional boundaries?

Keeping executive power from the executive

Whatever the reason, Congress now recognizes few or no constitutional obstacles to forcing its preferred arrangements on the rest of the government. Thus it not only resorts to funding restrictions, but it also establishes programs on very strange bases to ensure that the results favor its chosen constituencies.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

In several measures adopted at the end of the Reagan administration, for example, Congress put federal executive decisions under the control of officials not appointed by or accountable to the President. In one such measure, the Columbia Gorge National Scenic Area Act, Congress authorized the Secretary of Agriculture to acquire private land to protect a threatened scenic area. But at the same time it directed that the Secretary's decisions could be overruled by a commission appointed by state and local officials, and even by a single state governor. Needless to say, the President was given no means to protect the Secretary's decision from these administrative interventions. In a similar ploy, Congress authorized a commission of state officials to compel the Secretaries of Commerce and Interior to impose a moratorium on the harvesting of Atlantic striped bass.

In some cases, Congress has gone to extraordinary lengths to deprive executive agencies of executive power. In the mid-1980s, to cite one of the most bizarre and instructive examples, Congress was faced with a threat that drug companies would stop selling major immunization vaccines unless the companies were protected from ruinous tort damages in those rare cases in which vaccines provoke adverse (and sometimes even fatal) reactions. Rather than deal with tort law in any general way, Congress created a special fund to compensate victims in this one area. It was not an unreasonable response, but Congress then refused to let the Department of Health and Human Services administer this fund—even though it manages most other health-related injury-compensation programs. Instead Congress directed that compensation claims should be filed as suits against the government in the U.S. Court of Claims, to be heard by court-appointed special masters with no executive-branch involvement at all. Congress is already considering proposals to expand this very strange program—establishing court "cases" without a real defendant—to cover victims of radiation injuries and obstetric injuries, and those with other complex tort claims now clogging the civil courts.

In some ways, the vaccine-compensation program nicely illustrates the general impulses behind congressional micromanagement. Congress wants to have large programs, but it doesn't want to yield significant managerial authority to the executive bureaucracies that are often the most efficient means of implementing such programs. Nor in most matters does Congress trust state governments to make their own arrangements. Aware that it can no

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

longer make all the decisions on its own, Congress still wants to pull the strings so as to ensure that executive bureaucracies do not work against favored interests.

Congress will always be pulled in different directions by diverse constituencies. That is its chief claim to respect as a legislative body. So long as it retains power to initiate legislation and to alter budgets, Congress will also retain considerable influence on administrative undertakings. Congressional committees can even make useful contributions in spotlighting intolerable administrative abuses, like the recently exposed patterns of cronyism in the distribution of HUD grants or the bribery scandals in the EPA's administration of Superfund in the early 1980s. But Congress need not be so preoccupied with narrow interests as it has become in the past two decades.

Two generations of political scientists have been taught to scoff at the public-administration texts of the first decades of this century, with their repeated exhortations to remove "politics" from "administration." Yet whatever their blind spots, the high-minded reformers of the Progressive era at least were consistent in recognizing that a more ambitious government has to be a better-managed government. They took it for granted that the congressional patronage politics of the nineteenth century could not sustain a respectable, effective administration, adequate to the tasks that they wanted government to assume. In this they were surely correct. The Congresses of recent decades have reached far beyond the ambitions of the early twentieth century, but they have forgotten earlier anxieties about petty congressional politics. If the willfulness of congressional factions is to be curbed, Congress must be taught again to distinguish politics from payouts.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Micromanaging the defense budget

MACKUBIN THOMAS OWENS

IN 1982 GENERAL Edward C. Meyer, then Chief of Staff of the U.S. Army, stated that in America "the explosion of lawmaking and regulation-writing in the '70s has greatly complicated the development of a coherent defense posture"; he suggested that the individual chiefs had to spend too much time dealing with Congress and too little time directing their services. The problem raised by General Meyer has become even more pronounced now, and affects more than the services. The impact is felt throughout the Department of Defense (DoD) as a whole.

In particular, the congressional defense-budget process is sadly deficient. It is costly and inefficient, to the extent that it undermines the national defense. Everyone, including most members of Congress, knows this, but—because any change would mean that some individual members and some committees and subcommittees would have to give up power—little has been done.

No one denies that Congress has substantial constitutional powers in the area of national security. The Constitution states that

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Congress shall have the power to raise funds to "provide for the common Defence"; to raise and support armies, and the militia when in federal service; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to "exercise exclusive legislation ... over all places purchased ... for the erection of forts, magazines, arsenals, dockyards, and other needful buildings"; and to make all laws necessary and proper for carrying out the other powers. In addition, since Congress has traditionally delegated some of its powers to the executive branch, and since it shares with the President the power of appointment, the legislative branch has some power to oversee the departments of the executive branch.

The Constitution's delegation of congressional powers is not at fault; instead the problem is that Congress currently lacks the self-discipline needed to deal effectively with defense issues. Ironically, although Congress criticizes the Pentagon for lacking a defense strategy, it is Congress that prevents it from having one. Anything approaching a strategy is simply precluded by congressional micromanagement of the defense budget. Let me be clear: Congress *does* micromanage the defense budget, to a degree not appreciated by most citizens. And the United States is the weaker for it.

The evolution of the problem

Defense outlays currently constitute approximately 5 percent of the Gross National Product. Meanwhile, the House and Senate Armed Services Committees annually authorize every item in the defense budget, and some thirty committees and seventy-seven subcommittees claim some degree of oversight over defense. In 1988 fourteen full committees and forty-three subcommittees or panels held hearings concerning the Pentagon. This much congressional oversight of the defense budget is not the historical norm; in 1960, when defense constituted 9.5 percent of the Gross National Product, only two committees in each chamber—Armed Services and Appropriations—oversaw the defense budget.

In his classic study "The Changing Role of Congress in Defense Policy-Making" (*Journal of Conflict Resolution*, June 1976), Edward J. Laurance showed how the nature of congressional participation in defense matters changed significantly from 1968 to 1974. Between 1947 and 1967, according to Laurance, congressional involvement in defense matters focused on what Samuel Huntington has called "structural" as opposed to "strategic" issues. (The former

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

refers to financial, personnel, material, and organizational decisions; the latter to program or use decisions.) Congress did not play a major role in strategic issues because it was not organized to do so. The executive branch monopolized defense intelligence, and Congress had no independent sources of information upon which to base alternative policies. Staffs were small; some would say that they were inadequate to process the information generated by the executive branch. But this imbalance did not matter because the public generally supported executive dominance of defense policymaking.

During this period the legislative process was controlled by the executive. What legislative action there was on questions of defense policy occurred mainly in the defense subcommittees of the Appropriations Committees. The military committees relied solely on executive-branch witnesses, and since there was a fundamental consensus on defense issues, executive-formulated defense policies usually raised very little opposition. With few debates on defense issues, decisions made by the military committees were always accepted by their respective chambers as a whole.

Congress's role in defense matters began to change substantially in 1968, mainly as a result of the Vietnam War, decreased public perception of the external threat, perceived changes in national priorities, and the emergence of a permanent antidefense bloc in Congress. Many of the problems that beset the current congressional defense process originated between 1969 and 1974. In that period, the number of committees that held defense-related hearings rose, as did the number and length of these hearings and the number of DoD reports required by Congress. In addition, congressional hearings began to rely more on non-DoD witnesses and opponents of defense spending. The chambers as a whole, moreover, ended their deference to the decisions of the military committees; this change was reflected in, among other things, an increase in the number of floor amendments to defense bills.

Even before 1968, the power of the Armed Services Committees had been expanding, reflecting increased congressional activism in defense matters. Up until 1959, Congress did not authorize weapons and forces on an annual basis. Instead, the two Armed Services Committees authorized defense activities by type, and the two Appropriations Committees determined the specific amounts to be spent. But in 1959, as a result of the hearings held on the so-called "missile gap" by the Senate's Preparedness Inves-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tigating Subcommittee, a rider to the Military Construction Authorization Act stipulated that, beginning in 1961, annual authorization was required for all funds appropriated for the procurement of aircraft, missiles, or naval vessels.

Once begun, the expansion of detailed congressional oversight was inexorable. In 1962, at the behest of the House Armed Services Committee, Congress required annual authorization of all research, development, test, and evaluation (RDT&E) associated with aircraft, missiles, and naval vessels. In 1964 Congress included all other RDT&E carried out by the Defense Department, and the following year it mandated annual authorization for the procurement of all tracked combat vehicles. Congress also increased its control over reprogramming—the process by which the Pentagon changes its funding priorities by reallocating previously earmarked funds within an appropriation account.

In 1967 Congress required annual authorization of the personnel strengths of each service's Selected Reserve. In 1969, as a result of publicity over problems with the M-16 rifle, Congress began to require that it authorize appropriations for all weapons systems. Torpedoes were added in 1970. Additional control over both civilian and military personnel was established in 1972 and 1973. Authorization for the final two accounts—for operations and maintenance and for ammunition—began to be determined annually effective in fiscal years 1982 and 1983, respectively.

As they expanded their authorization processes, the Armed Services Committees started focusing less on the general military posture, instead getting caught up in examining each item of the annual defense bill. Sam Nunn, Chairman of the Senate Armed Services Committee, has described the harmful effects of this shift:

> [T]he extent to which we have wrapped ourselves around the budget axle is exacerbated by the growing tendency to examine budget proposals in even finer, almost microscopic, detail. The Armed Services Committee now authorizes almost every element of the defense budget each year, down to almost the last screw and bolt.... At its worst this tendency has spurred not unreasonable charges of congressional "micromanagement".... But even more troublesome, this trend to micromanagement has the staff and members focusing on the beach while we should be looking over the broad ocean and beyond the horizon.

Congressional oversight is far more detailed now than it was even after the changes of 1968-1974. Its harmful consequences

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

have been summarized by Secretary of Defense Dick Cheney in a "White Paper on the Department of Defense and Congress" that was sent to the President in January. According to Secretary Cheney, "The current congressional defense process is characterized by a multiplicity of actors, frequent decisions, lack of finality, disintegration and lack of accountability." The result, observes the *Wall Street Journal*, is that "Dick Cheney is Gulliver in Capitol Hill's Lilliput."

Testifying before everyone's committee

In 1961 twenty-seven witnesses, all from the DoD, testified during hearings on military procurement before the Senate Armed Services Committee. From a low of ten witnesses in 1967, the number expanded to 102 (including eighteen non-DoD) in 1969, and to 394 in 1973. At the same time, nonmilitary committees began to hold more hearings on defense matters.

The situation is even worse today. According to defense expert John Kester, in 1984 DoD witnesses testified 1,306 times for a total of 2,160 hours (not including preparation time, or time consumed answering questions "for the record") before ninety-six committees or subcommittees. Secretary Cheney's white paper proves the continuing validity of Kester's observation: "At times it seems as if Congress' goal is to keep senior defense officials at a witness table so that they have no way of doing their jobs."

The Secretary of Defense himself spends a great deal of time testifying before congressional committees. As former Secretary of Defense Caspar Weinberger remarks in his recently released memoirs *Fighting for Peace*, there are always six committees (the Armed Services Committee, the Defense Appropriations Subcommittee, and the Budget Committee of each chamber), and often two more (the House Foreign Affairs and the Senate Foreign Relations Committees), "to which the same testimony has to be given and many of the same questions have to be answered." The Secretary's subordinates spend even more time on the Hill. Assistant Secretary of Defense Rich Armitage testified 154 times during his seven years in the Reagan administration.

To make matters worse, more and more committees are claiming jurisdiction over defense matters. The Veterans' Affairs, Governmental Operations, Commerce, Small Business, and Banking Committees of the Senate and their counterparts in the House all claim to oversee some aspect of national security. The House

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Energy and Commerce Committee has been particularly aggressive in asserting its claims over the nuclear-weapons programs of the Department of Energy and the classified programs of the DoD.

The budget gauntlet

The budget process has become a gauntlet that the Pentagon must run yearly. First the Budget Committees of both houses establish overall spending levels. Then every item in the defense budget is authorized by the Armed Services Committees. Finally, money for defense must be approved by the Appropriations Committees. Excluding the separate Budget Committee hearings but counting the floor votes on the conference-approved bill, there are sixteen separate points at which Congress can modify a single program.

As an authorization bill works its way through both houses, any program submitted by the DoD may first be modified by the subcommittees of the two Armed Services Committees. Once the subcommittees have had their say, the authorization bill is considered by the full committees of both houses. Then the bill goes to the floor, where a program may be changed again. Finally, it must go to conference, where disagreements between the two chambers are resolved. Since the bill must pass both houses in the same form, it then returns to each floor for a final vote. In short, in the authorization process alone, a given program can be altered at eight separate points each year. And once authorized, programs face ample opportunities to be changed yet again by the Appropriations Committees. Defense-subcommittee markups, full-committee markups, floor debates, and conferences between House and Senate combine to provide eight more occasions on which programs can be modified.

According to the February 1984 issue of the *Armed Forces Journal*, the Senate Appropriations Committee changed 63 percent of the 1,129 line items of the Fiscal Year 1984 defense budget, and the House Appropriations Committee changed 68 percent. The Armed Services Committees meddled only slightly less, altering 62 percent in the Senate and 58 percent in the House. Secretary Cheney's white paper points out that congressional micromanagement of the defense budget through line-item changes peaked in FY1987, when a total of 2,100 line-item changes were made to the defense-appropriations bill and more than 1,200 were made to the defense-authorization bill.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Line-item changes declined from FY1987 to FY1989, after an agreement between Congress and the President on defense spending that resulted in the department's first two-year budget. But the trend is back up. In November 1989 the *Armed Forces Journal* reported that the Senate made 456 changes to the 1,535 line items in the procurement account of the FY1990 authorization bill.

The history of the recent debate over ICBM modernization illustrates the impact of the congressional budget process on the stability of any given defense program. The MX missile was first proposed in 1976 as a highly capable counterforce weapon designed to adapt to improvements that the Soviets had made during the 1970s in their strategic arsenal.

Opponents of the MX argued that it was "destabilizing" and that it lacked a viable basing mode; they immediately took advantage of the committee system and budget process to attack the program. Endless battles were fought at each point in the authorization process. When the opponents were defeated they could try again. If the missile was authorized, its appropriation could still be contested; if the missile's advocates prevailed one year, its opponents could freely return to the fray the next. Repeated assaults called into question every conceivable basing mode, and cut the number of proposed missiles from two hundred in 1976 to fifty in 1986.

The FY1986 defense authorization bill was a particularly egregious case in point. The Reagan administration requested forty-eight missiles, which both the House and Senate Armed Services Committees reduced to twenty-one. On the floor, the authorization was reduced to twelve by the Senate and to zero by the House. Even though the Senate-House conference restored funding for twelve missiles, a subsequent unsuccessful attempt was made in both chambers to eliminate the program again when the conference bill was brought to the floor. A similar struggle ensued during the appropriations process.

Opponents of the MX often touted the "small" ICBM—a mobile, single-warhead missile—as an alternative. Yet despite initial congressional enthusiasm for this "Midgetman" missile (when it could be used as a means to kill the MX), by the end of 1987 Rep. Norman Dicks, a strong supporter of the program, observed that the Midgetman was now "on life support." The missile now faces exactly the same type of opposition that confronted the MX in the early 1980s. Is it any wonder that there have been over three hundred separate votes on the MX and the Midgetman since 1981?

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Another measure of the growth in detailed congressional review of defense spending is provided by the budget-justification books sent to the Armed Services and Appropriations Committees. In 1977 the budget justification ran 12,350 pages; in 1988 it reached 30,114. "The fact that no one person can comprehend this material in total," states the white paper, "contributes to a myopic and disjointed review process"; it also points to another problem, the growth in congressional staff.

Laurance reported that the staff of the Senate Armed Services Committee increased from five members in 1963 to fifteen in 1972, before falling back to thirteen in 1974. This tripling of committee staff reflected the increase in the number of defense-budget items that are authorized annually. Staff on the four military committees increased rather more gradually, from thirty-seven in 1964 to sixty in 1984. But in 1984 and 1985 there was another explosion, raising the four-committee total to ninety-nine. In addition, there are sixty-six staff associates who work for individual members of the military committees or for congressional-support agencies. As Secretary Cheney notes, "The growth of staff expands what Congress is able to do, greatly magnifying the level of detail in most of its work."

Proliferating reports

The increasing detail demanded of the DoD by Congress is also reflected in the growing number of required reports. Laurance shows that DoD reports to Congress almost doubled from 1967 to 1972, going from seventy-nine to 134. But compared with the increase in the 1980s, that is insubstantial. In 1980 the Pentagon sent approximately 170 reports to the legislative branch; by 1988 the number was about 550. Reporting required by annual legislation tripled between 1982 and 1987, and after a decline in 1989, it increased with the 1990 budget cycle to a new high of 861. Two hundred and eleven of these are recurring reports; most of the others reflect one-time reporting requirements.

A cursory examination of some of the one-time reports required for FY1988 gives some indication of the absurd requirements imposed by Congress on the DoD. Among other things, various reports:

- presented DoD plans for manning and operating its tugboats;
- proposed survey questions pertaining to parental and family-leave policies;

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

- presented a concept plan and procedures to comply with congressional guidance on funding for morale, welfare, and recreation;
- accounted for the number of military bands;
- demonstrated the training of machine technicians in a production facility; and
- compared the goods-moving benefits available to civil-service households and those available to military households.[†]

The workload imposed by these detailed and often redundant reporting requirements levies a real financial cost on the Pentagon, while also reducing its efficiency. Secretary Cheney argues that the average report takes about a thousand hours to prepare and costs about $50,000. The total cost of these reports for FY1989 was over $50 million, and represented five hundred man-years.

Perhaps some relief is at hand. On May 3 the House Armed Services Committee introduced legislation to eliminate fifty-nine of the 211 annually required reports. Some of these reports are required as often as every other month. The goal, said Chairman Les Aspin, was to allow the Pentagon to concentrate on the more useful reports.

Floor debate on defense bills

Before 1968, floor debate on defense bills was normally brief, since the chambers as a whole deferred to the military committees. From 1957 to 1967 annual floor debate on the defense-authorization bill averaged one day in each chamber; on the defense-appropriations bill, it averaged less than two days. According to Laurance, floor debate on the Senate Defense Authorization Bill expanded dramatically in 1968, averaging twenty-five days a year from 1968 to 1971; debate on the authorization bill expanded somewhat in the House as well, though in neither chamber did debate increase on the defense-appropriations bill. From 1972 to 1974 Senate debate on the authorization bill fell back to an average of eight days, still considerably longer than it was before 1968.

After 1968 the number of floor amendments also increased substantially. While from 1957 to 1967 a total of only five amend-

[†]See the essay by Herman A. Mellor (a pseudonymous DoD official) titled "Congressional Micromanagement: National Defense," in Gordon S. Jones and John A. Marini, eds., *The Imperial Congress* (New York: Pharos Books, 1988), pp. 115-116.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ments had been offered to the Senate authorization bills, eighty-three were proposed from 1968 to 1971, including twenty-four by senators not on the military committees. But the 1968-1971 figures pale in comparison with those of the last decade. Each year the House commonly spends more than fifty hours of debate—spread over five to ten days—on the defense-authorization bill, and the Senate's debates are longer still; each chamber adopts, out of many more offered, a hundred amendments. In FY1986 the chambers adopted a combined total of 250 amendments to the authorization and appropriations bills.

What kind of amendments are typically offered? According to the August 1989 *Armed Forces Journal*, the House Rules Committee listed 218 proposed amendments to the FY1990 authorization bill. Ninety were expected to reach the floor in the three days of debate allotted by the House Democratic leadership. A majority of these would, if adopted, have added funds to the defense budget, although some would have cut major programs such as the B-2 bomber and SDI. The *Journal* argued that sixty-three, or about one-fourth of the total, qualified as "pure pork"—for example, a sense-of-the-Congress amendment asking the DoD to spend a fair share of its procurement dollars in rural counties, even though few major systems are built in such areas.

Secretary Cheney's white paper refers to the congressional imposition of specific requirements on individual programs as "program intervention," which

> often occurs in report language or in non-codified statutes such as general provisions, provisos and limitations. Intervention can also be exercised through budget adjustments, particularly those attributed to management or technical concerns, or additions which do not address valid military requirements.

Although the usual justification for congressional intervention is poor program management, specific directions usually have more to do with funding allocations than with management issues.

According to the defense white paper, the most comprehensive measure of specific congressional directions to the Pentagon is a report called "Actions on Recommendations in Congressional Committee Reports and Related Authorization and Appropriation Acts." The most recent report was prepared in 1986 and lists 1,024 specific requests, almost none of which relate to general policy. This total excludes program-specific limitations included in the main text of the authorization and appropriations bills.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Examples of congressional program intervention include required reports, earmarked funds, and structural requirements imposed on programs, including detailed directions to management, minimum-employment levels, and technology limitations. In addition, Congress enforces compliance by such measures as mandating outside audits, establishing review periods, and "fencing" funds pending compliance with provisions.

Why does Congress micromanage?

Since the Constitution has existed for some two hundred years, why has micromanagement become such a pervasive problem only recently? Two factors account for most of the current situation. First, Congress itself has changed. The Founders envisioned a body dedicated primarily to deliberation—reasoned debate on issues of broad policy. But Congress has come to focus instead on *administration*, the detailed management of the regulatory bureaucracy of an increasingly centralized state. Such a change in focus means that no detail is too small to escape the notice of members of Congress and their staffs. This has been reflected in the expansion of the Armed Services Committees' power to authorize every detail of the defense budget.

Accordingly, since 1970 Congress has reorganized itself by committees and subcommittees so that members can better oversee the federal bureaucracy and intervene in the details and day-to-day operations of executive and independent agencies. This diffusion of power has been accompanied by a breakdown in party discipline.

Second, the post-World War II consensus on national security broke down beginning with the Vietnam War, and a permanent antidefense bloc emerged in Congress. The result has been a continuing ideological conflict between the Democrats, controlling Congress, and the Republicans, with their recent lock on the presidency. As more and more members of the congressional antidefense bloc rise to positions of seniority, both within the military committees and without, they are better able to influence defense policy. When combined with the unique nature of the defense budget and the changing character of Congress, these developments contribute mightily to undermining the effectiveness of U.S. national security.

Defense spending is unique because it is largely discretionary, and therefore subject to annual review. Indeed, defense accounts

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

for nearly 60 percent of the federal government's discretionary spending. In addition, given the long production times for many defense items, there is a significant gap between money appropriated in a particular year for the DoD (budget authority) and the actual expenditure of that money (outlays). Most agencies spend money in the same year that commitments are made. In fact, most departments in the executive branch spend more than 90 percent of their funds in the same fiscal year in which they are appropriated. For the DoD, the figure is only about 50 percent, which goes mainly to pay salaries and operating expenses.

This factor creates a major problem for the Pentagon: the congressional budget process focuses on *outlays*, and while all of the DoD's budget authority for a given year is "controllable," only half of its outlays are. In order to obtain savings in outlays for the first year of a defense budget, it is necessary to cut budget authority severely, since cutting a dollar of budget authority saves only fifty cents in outlays rather than ninety cents.

House Budget Committee Chairman Leon Panetta, for example, has called for saving $8-$10 billion in defense outlays for FY1991, and Senate Budget Chairman James Sasser has spoken of a $20-billion cut. In a letter sent to Panetta in March, Armed Services Committee Chairman Aspin argued that such cuts cannot be achieved "without decimating the fast-spending personnel and readiness accounts—the very essence of the U.S. military."

According to Aspin, completely cutting the Rail Garrison MX, the small ICBM, the B-2, and the Advanced Tactical Fighter would save $8.2 billion in budget authority in FY1991, but only $1.8 billion in outlays for the first year. Indeed, Bill Dickinson, the ranking Republican on Aspin's committee, has observed that "Congress could eliminate the entire DoD procurement account for FY91, and the first-year outlay savings would amount to only $12 billion."

The incentives that govern the behavior of congressmen also account for micromanagement. Members must cater to the perceived needs of their constituents, and they do so in two ways that adversely affect the defense budget. On the one hand, individual lawmakers are understandably strong supporters of programs or installations that contribute to jobs in their states or districts. As a result, while they may argue for cuts in defense spending in general, legislators seldom oppose programs at home, no matter how wasteful they may be. The dynamics of Congress create an incentive for

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the antidefense bloc to join forces with members motivated primarily by parochial constituent concerns.

Last year's defense-authorization bill exemplifies this contradictory behavior, and shows how it makes defense spending less coherent. While some may disagree with his funding priorities, Secretary Cheney did what many of his predecessors had been reluctant to do; he proposed wholesale cuts in programs rather than trying to save money in the short run by stretching programs out over a longer procurement period, which raises their unit prices and increases their costs in the long run.

Arguing that it was most important in a period of transition to maintain an effective nuclear deterrent, the Secretary advocated funding the B-2 bomber, two ICBMs (the Rail Garrison MX and the small ICBM), and SDI. Among other systems and programs, he wanted to cut the Marine Corps's V-22 tilt-rotor Osprey, the Navy's F-14D, the Air Force's F-15E, and the Army's AH-64 Apache attack helicopter. Despite praise for Cheney's efforts, the House voted to slash the big-ticket strategic programs and rechannel the money into the programs that the DoD had wanted to cut. In effect, the House version of the FY1990 defense bill was produced by the permanent antidefense bloc (which wanted to cut the strategic systems) allied with individual members who wanted to preserve systems such as the V-22 and the F-14D out of concern for their constituents.

The costs of congressional micromanagement

Congressional micromanagement imposes real costs, beyond the obvious ones that result from the Pentagon's increased workload. According to the defense white paper, the specific management requirements resulting from the forty-two most significant congressional interventions called for in the 1989 budget cycle "increased costs in 75% of the programs, at a cost (combined with the costs of similar requirements on the same programs in prior years) of over half a billion dollars over the life of the affected programs. In only one instance was a schedule accelerated and savings realized as a result of the congressional requirements."

Congress's tendency to allow members to protect constituents by never killing programs encourages stretch-outs and other forms of program delays. A 1987 Congressional Budget Office report called "Effects of Weapons Procurement Stretch-Outs on Costs and Schedules" shows that decreasing production rates by 50 percent

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

increases the real unit cost of most weapons systems by anywhere from 7 to 60 percent.

The worst effect of congressional micromanagement of the defense budget is to increase program instability. Not only do the authorizing and appropriating committees change as many as 60 percent of the line items in the defense budget; in addition, committees sometimes sharply cut or eliminate a program in one year only to restore and even expand it in the next.

Uncertainty created by the instabilities that Congress introduces into defense programs ripples throughout the military-industrial complex, making it difficult for defense contractors to operate efficiently and further increasing the cost of defense. As I observed in a 1985 article in the *Armed Forces Journal*, efficiency demands that contractors—and their suppliers and subcontractors—have some idea of what they will be asked to produce each year. The uncertainties and delays caused by congressional micromanagement block efficient planning, and encourage contractors at every level to pad their prices in order to make enough money to keep operating while they await congressional action. Is it surprising that a 1989 study by the Center for Strategic and International Studies found that the defense industrial base lost access to 80,000 firms between 1982 and 1987, in a period when defense budgets were going up? Some of these firms went out of business, but most simply gave up on the Pentagon and sought other customers.

We cannot ignore another type of uncertainty: the kind fostered by Congress's political power plays in its ongoing struggle with the executive branch. Last year, for example, a Gramm-Rudman sequester led to across-the-board cuts in the defense budget, including military manpower accounts. The Pentagon has asked to reprogram funds from procurement accounts into manpower to prevent massive reductions in force and delays in promotion and recruitment, and the Senate Armed Services Committee agreed in April to go along with most of this request. The House, however, has adamantly refused even to consider the reprogramming request. Chairman Aspin said, "Putting weapons before people was [the administration's] decision and now they're stuck with it." According to the Pentagon, if the House does not permit reprogramming, 32,000 members of the armed services—including both officers and enlisted men and women—would have to be released. Promotion delays would affect 67,000 others, and there would be 115,900 fewer recruits this year.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

What is to be done?

The current congressional defense-budget process places unnecessary burdens on the Department of Defense. The key to repairing the process is to change the incentive structure so that Congress does not identify its interests with detailed oversight of every aspect of the defense budget. This can best be done by shifting the focus of congressional debate; Congress should concentrate not on programmatic details, but on broad policy issues.

A useful first step would be to lengthen the budget cycle. Congress has already experimented with a two-year budget authorization (although appropriation remains on an annual basis), which the Pentagon believes has increased program stability. Two-year budgets and authorizations should become standard, with an eye toward an eventual five-year authorization process.

A second step would be to revise the budget process in order to fund entire forces (outputs) rather than individual items of input, such as aircraft, tracked vehicles, and the rest. By focusing on outputs, such as tactical-fighter wings, carrier-battle groups, or armored divisions, Congress and the Pentagon could examine the broad force-planning tradeoffs necessary to achieve national-security goals.

Similarly, Congress should fund whole missions rather than the separate programs that accomplish each mission. Currently a service may have only one funded program to meet a particular mission requirement; if the service loses the program, in effect it becomes unable to carry out the mission. Thus services tend to shield even their defective programs, fixing and patching as they proceed. They have no incentive to scrap a marginal or defective program, and to propose an alternative approach that would meet the mission requirements.

Institutional changes would also help improve the congressional budget process. As the defense white paper argues,

> Authorizing committees should leave line-item budgeting to the appropriators. In turn, the appropriations committees should adhere to major resource allocation and force design ... decisions made in the authorization process. The executive branch should be given greater flexibility in executing budget and policy decisions.

Such changes would allow all parties to concentrate on what they do best, and would help achieve the stability essential to true strategic planning.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

As Caspar Weinberger said in his 1987 annual report to Congress:

> Members of Congress, especially members of the committees most concerned with defense, should act as an informed board of directors for the nation's shareholders—reviewing DoD's plans, programs, and performance. But boards of directors reach conclusions and either authorize management to proceed, or demand presentation of new proposals for quick decision. Endless debate is not a strength.

Congress could also take many other less radical steps to improve its oversight of defense issues, while reducing the unnecessary burden that the current process places on the Pentagon. The most important of these is to reduce the reporting and budget-justifying requirements that Congress imposes on the DoD.

Congress's constitutional mandate gives it a legitimate interest in the proper management of defense spending. But the evidence is overwhelming that Congress does not best carry out its constitutional responsibility by micromanaging the DoD. Unfortunately, the incentives created by the current budget process and the imperatives of congressional response to constituents make micromanagement inevitable. The very security of America requires that the congressional defense-budget process be reformed as quickly as possible.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Locke and the legislative principle

WALTER BERNS

***Woodrow Wilson*: Congressional Government.** *Originally published 1885; Meridian ed. 1956. 222 pp.*

***James Burnham*: Congress and the American Tradition.** *Henry Regnery, 1959. 363 pp.*

***Arthur Maass*: Congress and the Common Good.** *Basic Books, 1983. 273 pp.*

WHAT IS THE ROLE of Congress in our system of constitutional government and how well does it perform that role? To begin with, Congress is not Parliament, which means that ours is a system of constitutional—not parliamentary—supremacy. Accordingly, we speak of three coordinate branches of government, each deriving its powers from the Constitution (and each capable of violating it). Still, it is not unreasonable to look upon the legislative as the first among equals. After all, the first article of the Constitution deals with the legislative power, and that is not the result of chance: we pride ourselves on being a government of laws, and Congress makes the laws.

Like so many of our political principles, this idea of legislative superiority (but not supremacy) derives from John Locke's *Second*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Treatise of Government. Locke began, as did his predecessor Thomas Hobbes, with an analysis of the condition in which men find themselves naturally, or before government is instituted. According to Hobbes, this state of nature is indistinguishable from the state of war, where—because there is no government and because everyone has an absolute right not only to preserve himself but, as well, to whatever means are required to preserve himself—"the life of man [is] solitary, poor, nasty, brutish, and short."

Locke's analysis was essentially the same. "To avoid this state of war," he wrote, "is one great reason of men's putting themselves into society and quitting the state of nature." True, "the state of nature has a law of nature to govern it," and this law of nature obliges everyone "to preserve himself and ... when his own preservation comes not in competition ... to preserve the rest of mankind." But in the absence of any governing authority, everyone is himself the "*executioner of the law of nature*," which means, of course, that everyone is entitled to decide when self-preservation comes into competition with preserving "the rest of mankind." The consequence, again, is war, or at least the strong possibility of war.

Hobbes found the means to peace in a contract according to which everyone surrenders his absolute rights to a sovereign, the Leviathan, whose job is to keep the peace. But as the custodian of everyone's absolute rights, Hobbes's sovereign becomes, in principle, absolute himself. Hobbes left it to those who followed him to solve this problem, by discovering a way of keeping the sovereign's powers, at least in practice, from being absolute. As Locke put it, to avoid the mischiefs done them in the state of nature by "polecats or foxes," men should not be thought so foolish as to enter a society in which they will be "devoured by lions."

Locke's solution was a contract in which men yield the powers that they exercise by right in the state of nature not to a person, but rather to the legislative. He argued that this was the safer arrangement, for while the legislative is "supreme," it is bound to govern by "standing laws"; it speaks the language of laws, not of decrees. Furthermore, the legislative power can be exercised, and is best exercised, by an assembly whose proceedings can be subjected to rules or forms and whose members are themselves subject to the laws that they make. This, Locke said, "is a new and near tie upon them to take care that they make them for the public good." Finally, because the legislature is not always in session, and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

there is need for "a power always in being which should see to the execution of the laws that are made and remain in force," Locke provided for an executive, separate from the legislature, thereby giving rise to the idea of a separation of powers. In this way—i.e., by means of certain institutions—Locke solves, or at least mitigates, the problem bequeathed him by Hobbes. Power could be rendered safe by constitutionalizing it, a point repeated and elaborated by Alexander Hamilton in *Federalist* 9.

By separating the executive and the legislative, however, Locke also originated the idea of the modern executive, an official with considerable powers of his own. Locke endowed him with the "prerogative," the power to act "according to discretion for the public good, without the prescription of the law and sometimes even against it." Such "extra-legal" discretion is needed especially in the exercise of what Locke called the "federative power," the power of deciding "what is to be done in reference to foreigners." Foreign affairs are "much less capable [of being] directed by antecedent, standing, positive laws." Here, as elsewhere, the Framers agreed with Locke: "With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense? If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed it might prudently chain the discretion of its own government and set bounds to the exertions for its own safety." The Framers seemingly followed Locke in this regard; but their creation of a constitutionally authorized presidency (which legalized what for Locke was an extra-legal power) meant that the separation of powers inevitably led to a contest between the executive and the legislative and to a never-ending dispute among constitutional authorities as to who was authorized to do what and when.

Woodrow Wilson and congressional supremacy

The three books under review share a common perspective: they look at Congress in its relation to the executive branch, differing only in their assessments of its place and powers.

Woodrow Wilson's 1885 book *Congressional Government* complains of Congress and deplores the weakness of the executive. "The balances of the Constitution are for the most part only ideal," Wilson wrote; despite or perhaps because of the Constitution, Congress became "predominant over its so-called coordinate branches[, ruling both executive and judiciary] with easy mastery

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and a high hand." For example, the Senate, caring nothing for the "feelings" of foreign powers, rejected the carefully negotiated treaty with Denmark respecting the status of the island of St. Thomas, and then threw "every possible obstacle in the way of confirmation of the much more important treaty with Great Britain relative to the Alabama claims." But, Wilson goes on,

> it is not necessary to dwell at length upon these well-known incidents of our later history, inasmuch as these are only two of innumerable instances which make it safe to say that from whatever point we view the relations of the executive and the legislature, it is evident that the power of the latter has steadily increased at the expense of the prerogatives of the former, and that the degree in which the one of these great branches of government is balanced against the other is a very insignificant degree indeed.

The consequence of congressional supremacy is, Wilson argued, irresponsible government. How can we identify whom to praise and whom to blame for what is done by the government? Indeed, who can be said to govern when power is dispersed among the chairmen of the various standing committees (as it was in the House of Representatives), and when those chairmen do not consult each other or, worse, never think "of acting in concert"? The cure for this was constitutional change, with a view to establishing responsible party government on the British cabinet model.

In this respect, Wilson deliberately rejected the Framers' solution to the problem of democracy. Whereas they sought to prevent the formation of simple majorities—this with a view to securing the rights of minorities—Wilson wanted government by majority party. "The British system is perfected party government," he writes, and among the features that make it perfect is that no effort is made in the House of Commons "to give the minority a share in law-making." Nowhere does Wilson express any concern that a majority so organized and led might fit Madison's description of a faction—"an interested and overbearing majority ... adverse to the rights of other citizens [and] to the permanent and aggregate interests of the community."

James Burnham and the death of Congress

As is well known, Wilson eventually decided that his analysis had become "hopelessly out of date." Writing in 1900, in the preface to the fifteenth printing of *Congressional Government*, he acknowledged that formal constitutional change was not necessary

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to make the presidency into a powerful office. He noted that after the war with Spain and the country's entrance into world politics, the office had in fact regained the authority it had enjoyed under Lincoln and during the early years of the republic. "The President of the United States is now, as of course, at the front of affairs" and capable of exercising, of right and necessity, "constructive statesmanship." This was the view that he took to the White House—and it is the view that disturbed James Burnham. Burnham called it the liberals' view, and charged Wilson with being "something of an ideologue"; Wilson, he said, was previously exaggerating the power of Congress, but "he was exaggerating a truth": at the time that he wrote, Congress was predominant, "supreme even."

And why should it not have been supreme at that time? Beyond "tak[ing] care that the laws be faithfully executed," what was there for the President to do in 1885? As the authors of the *Federalist* made abundantly clear, the executive power comes into its own (and is there to be used) when it is necessary to protect the country against "invasions of the public peace by foreign war or domestic convulsions"; especially compared with what preceded and what was to follow, the 1880s were singularly free of wars and convulsions, foreign or domestic. Wilson's mistake (as he was later to recognize) was in failing to take account of the conditions that prevailed when he wrote. Burnham's mistake was in failing to take account of the party controlling the White House.

According to Burnham, what Wilson saw as an aberration was intended to be the rule:

> The primacy of the legislature in the intent of the Constitution is plain on the face of that document, as it is in the deliberations of the Philadelphia Convention. It is the Constitution's first Article that defines the structure and powers of the legislature. The legislative Congress is to be the sole source of all laws (except the clauses of the Constitution itself). In the conduct of the general government, Congress alone can authorize the getting or spending of money. It is for Congress to support, regulate and govern the Army and Navy, and to declare war. Save for the bare existence of the Supreme Court, it is for Congress to establish and regulate the judicial system. All officers of both executive and judiciary are subject to congressional impeachment; but for their own official conduct the members of Congress are answerable only to themselves.

Burnham acknowledged that the equilibrium among the different branches of government had changed over the course of our

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

history—that the superiority of the executive during the Civil War period, for example, had been followed by the superiority of Congress in the succeeding period—but with the advent of President Franklin D. Roosevelt in 1933, Congress became (and remained) a junior partner. "To understand what is happening to the political structure of American society," he wrote, "we need to keep both facts in mind: that the legislature was, traditionally, predominant in theory and practice; and that it is no longer so."

The legislature is predominant in theory—by which Burnham meant the theory that informed the Constitution—because the Framers understood that personal liberty depended on legislative supremacy. Quite properly, he argued, they were more concerned with "the limits than with the powers of government," but with the rise of the modern executive, those limits had been ignored, rendered useless or, as Wilson might have put it, "only ideal." Rather than taking the lead in making the laws, Congress had been reduced to merely enacting the programs proposed by the president. For this, Theodore Roosevelt and Wilson—but especially Wilson—were to blame. It was Wilson who, with the coming of World War I, "carried presidential law-making in some instances close to what it was to become more frequently under the second Roosevelt during World War II: government by executive decree."

As Burnham saw it, the situation was only marginally different in peacetime. Congress, he thought, had lost control of the purse. "How often in the years since 1932 has Congress expressed an independent will, contrary to the will of the executive, on money matters of major importance?" The same was true of its treaty power. Although modern treaties—respecting the United Nations, the Organization of American States, and the North American Treaty Organization—were at least nominally made with the advice and consent of the Senate, they still effectively deprived Congress not only of its power over appropriations but also of its power to declare war.

The one power of Congress that had "freshened rather than withered during the past generation" was, ironically, one that is not mentioned in the text of the Constitution—the power to investigate. But the effectiveness of this power was threatened by an expanded notion of executive privilege:

> This earlier occasional practice—which like so much in the older American tradition commends itself to ordinary common sense—has now been blown up into a polished routine. By an administrative

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> fiction, the "confidential" relation between President and subordinates—which in the past meant a literal personal relation between man and man—has been extended to the entire bureaucracy, so that the executive now claims a right to order any official or employee of the bureaucracy to refuse to testify to an investigating committee, or to withhold almost any sort of document or record pertaining to any department or agency.

Burnham concluded with a somber projection of the future. "Will Congress survive?" he asked. Perhaps, but probably not. "The trends, both national and world-wide, no longer episodic but holding over a number of decades, are against the survival of Congress (or any other representative assembly in any major nation) as an active, independent political institution." Nor was this all. "To ask whether Congress can survive is, in turn, equivalent to the question: Can constitutional government, can *liberty*, survive in the United States?"

Congress, as he put it, is the principal "intermediate institution, the chief political organ of the people as distinguished from the masses, the one body to which the citizenry can now appeal for redress not merely from individual despotic acts ... but from large-scale despotic innovations, trends and principles." On the one hand, Congress, the rule of law, limited government, and liberty; on the other hand, bureaucracy, Caesarism, plebiscites, and big central government. The latter alternatives define what Burnham called "the managerial revolution," which he thought would usher in a regime reminiscent of Tocqueville's "soft despotism."

As it turned out, of course, the news of Congress's demise was, at best, premature: Congress remains the "intermediate institution" to which the citizenry—savings-and-loan bankers, sugar-cane and peanut growers, indeed, citizens (or their lobbyists) of every stripe and mission—can appeal for a lot more than the redress of grievances. Nor can it be said that the trend is against the legislative power. Congress has surely not lost control of the purse; on the contrary, presidents are no longer able to control expenditures by "impounding" funds, and their budgets, duly submitted to the Congress, are duly pronounced "dead on arrival." (It remains to be seen whether the same is not also true of their judicial nominations.) Rather than expanding, the "notion of executive privilege" has been contracted to the point that to invoke it is to risk criminal prosecution; and the fate of SALT II is sufficient to remind us that the Senate has not lost its power over treaties. To say the least, Congress has survived; in the process, it has begun to exercise

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

powers that were formerly understood to belong to the executive. Had he paid more attention to electoral developments, Burnham might have foreseen this, for, as someone once said, the powers of a republican president are not likely to survive the advent of a Republican president.

Arthur Maass and the modern Congress

Arthur Maass's is a different kind of book; rather than arguing for the superiority of one or the other of the two political branches of government, he is content to describe and explain their relationship. His focus is on congressional institutions and procedures. But as he is quick to point out, little or nothing of what Congress does can be described, let alone explained or evaluated, in isolation from the executive. Both bodies are engaged in the common enterprise of representing constituencies (albeit different ones); similarly, both play parts—different but complementary—in legislating and administering. In fulfilling these tasks, Maass says, the executive plays the role of leader, while the Congress plays that of controller and overseer. In the final section of the book, Maass provides a detailed account of the various institutions and procedures used by Congress to carry out its functions: the budget process, legislative vetoes, committee investigations, and the like. All of these involve the executive in one way or another, and all of them are much in the news these days. For anyone interested in learning what Congress does and how it does it, this is the book to read; for anyone interested in learning how well it does what it is supposed to do, the book leaves something to be desired.

This is somewhat surprising, for Maass begins by rejecting what might be called the behavioral-science model of political analysis. According to this model, members of Congress are primarily interested in being reelected; to that end, they simply represent their constituents and then, collectively, aggregate and adjust their interests. He prefers to believe that the common good or the public interest is something other than, and is distinct from, "the outcome of [this] process called partisan mutual adjustment." Hence he proposes to judge "both Congress and Executive ... by how well they represent, promote, and protect the public interest of the political community at large and how well they resist control by special and particular interests." Unfortunately, having defined (if only vaguely) the criterion by which he would judge, he does less judging than the facts that he uncovers would seem to justify.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

For example, Maass knows very well what lay behind the Iran-*contra* affair, which did so much to strain congressional-executive relations. There is, he says, "a problem in connection with making secret data available to Congress, namely, if Congress cannot handle such data responsibly, the Executive will resist providing the data." He provides examples of congressional irresponsibility, but assures us that since 1976 both Houses have been more willing to face up to the problems. Maass then quotes, in their entirety, the procedures adopted for handling secret data.

He is far too cautious, however, in assessing their efficacy. Are the procedures adequate? Will they be enforced? Will offending members be disciplined? Maass says only that all of this "remains to be seen." Perhaps it does, but the record affords little reason for confidence. Thus Maass recounts the effort by Senator Mike Gravel to disclose the contents of a top-secret National Security Council memorandum, an effort blocked by a decision taken in a closed executive session. But Gravel, without advance notice, proceeded to read excerpts from the memorandum into the *Congressional Record*. Worse, he then gave a copy of the complete memorandum to Congressman Ronald Dellums who placed it in the *Record* "by simply asking unanimous consent to extend his remarks ... without giving any hint of their contents." The Senate responded only by creating an ad hoc committee to study the problem. Far clearer, by contrast, is Congress's zeal in taking action against members of the executive branch; under the law, they are subject to dismissal and sometimes—as in the case of Oliver North and John Poindexter—criminal prosecution.

But more seriously still, why should it be assumed that, unlike State Department officials—Alger Hiss, for example—and other federal employees, members of Congress are incapable of disloyalty? Popular election is surely not the equivalent of a loyalty and security check. Some congressional staff members are subject to these checks, but there is reason to wonder how thoroughly they are investigated. If, as happened a few years ago, a heroin addict could be appointed to the staff of the Senate Select Committee on Intelligence, how can we be sure that it is free of unfriendly communist "moles"?

In fact (although Maass says nothing about this), Congress exempts itself from many of the legal restrictions that it imposes on the rest of the country. Under the Independent Counsel provisions of the Ethics in Government Act, even the president and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

vice president are subject to investigation, prosecution, and imprisonment, but members of Congress are not. Colleges, universities, and businesses of almost every description are subject to the civil-rights laws respecting the hiring of minorities, women, and (soon) the handicapped, but not Congress itself. The federal Office of Personnel Management is under court order to devise tests that will ensure hiring according to a quota system, but members of Congress are free to hire whom they please. Even the minimum-wage law does not apply to Congress. Former Attorney General William French Smith points out that Congress has exempted itself from the provisions "of every major piece of legislation since the National Labor Relations Act of 1935."

Although Maass says nothing about this, we have obviously come a long way since John Locke could place confidence in the legislative because its proceedings could be subjected to forms and rules and because its members are themselves subject to the laws they make. Today's Congress is adept at avoiding forms and rules. In *INS* v. *Chadha* (1983), for example, the Supreme Court declared the legislative veto unconstitutional as a violation of the separation of powers, but the decision had no practical effect; within three years, Congress had passed bills including an additional 102 legislative vetoes. Of course, there are good reasons for legislative vetoes; oddly enough, their use gives administrative agencies a good deal of discretion (to change rules, to move funds around, etc.), and as Maass points out, they are efficient means of providing congressional oversight. For Locke, however, the virtue of forms—especially constitutional forms such as the separation of powers—does not lie in their efficiency. On the contrary, forms are good because, in a sense, they impede efficiency; and this, as Tocqueville argued, makes them especially useful to democracies:

> [The] objection which men of democracies make to forms is the very thing which renders forms so useful to freedom; for their chief merit is to serve as a barrier between the strong and the weak, the ruler and the people, to retard the one and give the other time to look about him. Forms become more necessary in proportion as the government becomes more active and more powerful, while private persons are becoming more indolent and more feeble. Thus democratic nations naturally stand more in need of forms than other nations, and they naturally respect them less.

Burnham would have appreciated this, and Maass would have written a better book had he done so as well; it is, after all, a constitutional matter.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Maass would also have written a better book had he paid some attention to Congress's habit of exempting itself from the laws that it makes. Unlike the legislative that Locke had in mind, our Congress, in effect, never goes home; not only is it almost always in session, but its members also tend to serve almost forever. In 1988, for example, 99 percent of the House members who sought reelection were reelected. As a reward for having promoted the common good? Or, rather (as one congressman put it), as a reward for having shipped home "carloads of pork"? In exchange for this service, and not incidentally, they received substantial sums of money in the form of campaign contributions which they do not need, do not spend, and which they are permitted to take into retirement with them if they do decide to retire. Parting, as Shakespeare said, is such sweet sorrow.

Maass provides a wealth of detail about the workings of Congress, but by neglecting to discuss these matters, his account is by no means complete, and—like Wilson's and Burnham's—not completely satisfying.

A complete and satisfying account would begin where the Framers began. It would recognize, first, the importance of being governed by law (and, therefore, the importance of peace and the primacy of the legislative); second, the ever-present possibility of war and, precisely if rights are to be secured, the need to avoid it or to wage it successfully (and, therefore, the primacy of the executive); third—something we heard nothing about during the Iran-*contra* hearings—the tendency of the legislative to extend the sphere of its activity and draw "all power into its impetuous vortex"; and fourth, the role of money in allowing "unworthy candidates to practise with success the vicious arts by which elections are too often carried [and power too often exercised]."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

TO OUR READERS

Effective with this issue, the new prices for *The Public Interest* are:

Current issue:	$5.50
Back issue:	$6.00
One-year subscription:	$21.00
Two-year subscription:	$38.00
Three-year subscription:	$54.00

Add $3 per year for foreign subscriptions.

Subscription orders should be sent to:

The Public Interest
Subscription Office, Dept. PI
P.O. Box 3000
Denville, NJ 07834

Back-issue orders and all other correspondence should be sent to:

The Public Interest
1112 16th Street, N.W., Suite 530
Washington, D.C. 20036

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

In upcoming issues of

THE Public Interest

HARVEY C. MANSFIELD, JR.
looks at Harvard

JULIAN SIMON
reports a revolution in economics

IRVING WELFELD
denies "the housing problem"

WILLIAM TUCKER
studies housing under Reagan

JAMES P. SCANLAN
explains how policymakers misuse statistics

JOHN LANGBEIN
examines the death of inheritance

BOOK REVIEWS BY
Richard John Neuhaus
Abigail Thernstrom
Allan H. Meltzer
Donald Kagan
Marc Plattner

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

CONTRIBUTORS

FRED BARNES is a senior editor of *The New Republic*. He is also a political commentator on the weekly television program "The McLaughlin Group."

WALTER BERNS is John M. Olin Professor of Government at Georgetown University and an adjunct scholar at the American Enterprise Institute for Public Policy Research.

L. GORDON CROVITZ is assistant editor of the editorial page for the *Wall Street Journal*.

MICKEY EDWARDS of Oklahoma is the fourth-ranking Republican in the U.S. House of Representatives and is chairman of the House Republican Policy Committee.

TERRY EASTLAND is author of *Ethics, Politics, and the Independent Counsel: Executive Power, Executive Vice, 1789-1989*.

EVERETT CARLL LADD is a professor of political science at the University of Connecticut, and executive director and president of the Roper Center for Public Opinion Research.

GARY L. McDOWELL is a visiting scholar at Harvard Law School.

NORMAN ORNSTEIN is a resident scholar at the American Enterprise Institute for Public Policy Research.

MACKUBIN THOMAS OWENS is editor-in-chief of *Strategic Review* and a professor of defense economics at the Naval War College.

JAMES L. PAYNE is director of Lytton Research & Analysis. His article is based on his forthcoming study *The Culture of Spending*. He has taught political science at Yale, Wesleyan, Johns Hopkins, and Texas A&M.

NELSON W. POLSBY is director of the Institute of Governmental Studies at the University of California at Berkeley.

JEREMY RABKIN is an associate professor of government at Cornell University.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED